APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-35317

In Re: DOUGLAS E. MILLER,
Debtor.

BONNIE G. SNAVELY,
Defendant-Appellant,

v.

DOUGLAS MILLER,
Debtor-Appellee.

Argued and Submitted Nov. 3, 2004.
Decided Feb. 7, 2005.

Appeal from the United States District Court
for the District of Montana,
Donald W. Molloy, Chief District Judge, Presiding.
D.C. No. CV-02-00023-DWM.

BEFORE: ALARCÓN, W. FLETCHER, and RAWLINSON, *Circuit Judges.*

MEMORANDUM *

Bonnie Snavely appeals from the district court's order affirming the bankruptcy court's order and judgment in adversary proceedings between Ms. Snavely and her brother, debtor-in-possession Douglas Miller. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I

At the hearing on this appeal, Ms. Snavely argued that the King County Superior Court of Washington's oral ruling that the Trust was a spendthrift trust was binding on the bankruptcy court even though the judgment was not entered until after Mr. Miller's automatic stay from his bankruptcy case was in place. Ms. Snavely argued that as a spendthrift trust, the Trust was not property of Mr. Miller's estate, and pursuant to 11 U.S.C. § 541(c) therefore was not subject to the automatic stay from Mr. Miller's bankruptcy filing.

Ms. Snavely raised this argument for the first time during oral argument. Ordinarily, we will not consider an argument raised so late. *See* Fed. R.App. P. 28(9)(A) and (B) (appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and for each issue, a concise statement of the applicable standard of review"); *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.2003) (Court of Appeals will not consider an appellant's claims that were not argued specifically and distinctly in a party's opening brief). However, we did consider, and reject, this argument in our published opinion in a related case between the same parties. *See Snavely v. Miller*, No. 03-35894 (9th Cir. Feb. 2, 2005). Accordingly, we reject this argument here as well.

II

Ms. Snavely contends that the Trust's proof of claim is not a core proceeding because the Trust is not Mr. Miller's creditor and she filed the proof of claim involuntarily. She also contends that Mr. Miller's counterclaims are not core proceedings. We disagree.

28 U.S.C. § 157(b)(2)(B) expressly includes "the allowance or disallowance of claims against the estate" as core proceedings. Ms. Snavely filed a proof of claim on behalf of

the Trust for $603,906.12 for administrative expenses she contends Mr. Miller owed the Trust. "The filing of a proof of claim is the prototypical situation involving the 'allowance or disallowance of claims against the estate,' a core proceeding under 28 U.S.C. § 157(b)(2)." *In re G.I. Industries*, 204 F.3d 1276, 1279-80 (9th Cir.2000) (citations omitted).

Ms. Snavely was not forced to file the proof of claim nor was the filing involuntary. Mr. Miller listed Ms. Snavely as an unsecured creditor on his bankruptcy schedules. The district court ordered Ms. Snavely to file a proof of claim "asserting all the sum to which she asserts the Trust is entitled as expenses of administration" from Mr. Miller's share of the Trust. If there were no sums for which she asserted Mr. Miller was indebted, Ms. Snavely could have elected not to file the proof of claim on the basis that the Trust had no sums to claim.

The Trust was a creditor of Mr. Miller. The attachments Ms. Snavely filed in support of the Trust state that the Trust expended $1,803,318.35, including interest, based on various loans and expenses paid by Ms. Snavely as trustee. The attachment asserts that Mr. Miller owes the Trust one-third of that amount, or $603,906.12. *See* 11 U.S.C. § 101(10)(A) (a creditor is an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor); § 11 U.S.C. 101(5)(A) (a claim is a right to payment, whether or not such right is reduced to judgment). During oral argument, Ms. Snavely's counsel conceded that the Trust is a creditor of Mr. Miller if 11 U.S.C. § 541(c) does not apply.

III

28 U.S.C. § 57(b)(2)(C) expressly includes "counterclaims by the estate against persons filing claims against the estate" as core proceedings. Mr. Miller's claims are core proceedings because they are "counterclaims" under 28 U.S.C.

§ 157(b)(2)(C). Although Mr. Miller's easement claim was tried before Ms. Snavely filed the Trust's proof of claim, the bankruptcy court did not issue an order or judgment on this claim until November 27, 2001, after the Trust's proof of claim was filed. Further, 28 U.S.C. § 157(b)(2)(O) expressly includes as core proceedings "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death actions."

IV

Ms. Snavely contends that the bankruptcy court lacked subject matter jurisdiction over the Trust's proof of claim under the "probate exception." In *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 90 L.Ed. 256 (1946), the Supreme Court held that the probate limitation prohibits a federal court only from probating a will or administering an estate. *Id.* Federal courts have jurisdiction to entertain suits concerning probate property as long as they do not interfere with state probate proceedings. *Id*; *see also Marshall v. Marshall*, 392 F.3d 1118 (9th Cir.2004) (quoting *Markham*, 326 U.S. at 494, 66 S.Ct. 296). The bankruptcy court "[did] not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham*, 326 U.S. at 494, 66 S.Ct. 296. Accordingly, the bankruptcy court had subject matter jurisdiction over the claim.

V

Ms. Snavely contends that the bankruptcy court erred in failing to consider the fact that many of Mr. Miller's counterclaims are barred by res judicata, collateral estoppel, and accord and satisfaction. She argues that Mr. Miller's claims were litigated and resolved in Ms. Snavely's January 2, 1997 confirmed plan of reorganization, the 1994 settlement agreement in the Margueritte Miller bankruptcy between Margue-

ritte Miller and Mr. Miller, and the dismissal of claims Mr. Miller filed in Ms. Snavely's bankruptcy in 1998.

In prior appeals to this court in *Snavely v. Miller*, No. 02-35290, 81 Fed.Appx. 89, 2003 WL 22455457 (9th Cir. Oct. 29, 2003) (Mem.) (*amended on* Apr. 29, 2004) and *Snavely v. Miller*, No. 02-35313, 81 Fed.Appx. 89, 2003 WL 22455457 (9th Cir. Oct. 29, 2003) (Mem.) (*amended on* Apr. 29, 2004), Ms. Snavely argued that Mr. Miller's claim for a determination of easement rights regarding tracts CC and DD of his property was barred by the doctrine of res judicata because the United States Bankruptcy Court in the Western District of Washington had dismissed Mr. Miller's claims, including his easement claim in Ms. Snavely's bankruptcy case. She further argued that the easement claim was extinguished by the 1994 settlement agreement and was therefore barred by accord and satisfaction.

This court expressly rejected application of res judicata and accord and satisfaction to Mr. Miller's claim for a determination of easement rights regarding tracts CC and DD on October 29, 2003. *Snavely v. Miller*, No. 02-35290, 81 Fed.Appx. 89, 2003 WL 22455453 (9th Cir. Oct. 29, 2003 at 2-3) (Mem.) (*amended on* Apr. 29, 2004); *Snavely v. Miller*, No. 02-35313, 81 Fed.Appx. 89, 2003 WL 22455453 at 3 (9th Cir. Oct. 29, 2003) (Mem.) (*amended on* Apr. 29, 2004). We will not reexamine issues previously raised and decided by another panel of this Court. *See Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir.2002) (under the law of the case doctrine, a court is precluded from reexamining an issue previously decided by the same court in the same case). None of the reasons for deviating from the law of the case applies here. *See Gaudin v. Remis*, 379 F.3d 631, 636 (9th Cir.2004) (reasons for deviating from the law of the case are (1) that the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling author-

ity makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial).

We agree with the bankruptcy court that res judicata and collateral estoppel do not apply to Mr. Miller's remaining claims. Ms. Snavely's tortious conduct occurred over an extended period of time, both before and after the prior judicial determinations upon which she relies. Ms. Snavely denied Mr. Miller access to any easements for his property beginning in 1997 and made attempts to thwart the sale of Mr. Miller's property to Dr. Glenn Jarrett beginning in 1999. Ms. Snavely's tortious efforts followed a January 19, 1996 order by the bankruptcy court directing her to grant access and an easement to Mr. Miller. Ms. Snavely failed to do so after 1997.

Mr. Miller testified that he suffered emotional distress which post-dated 1997. Finally, the bankruptcy court found that Mr. Miller incurred monetary damages from January 2000 until September 1, 2001. The bankruptcy court did not err in concluding that Mr. Miller's claims were not barred by res judicata and collateral estoppel.

VI

Ms. Snavely contends the bankruptcy court erred in concluding that the Trust required an annual accounting. Both the Trust instrument and Washington trust law require an annual accounting. *See Polsen v. Nelson*, 21 Wash.App. 489, 585 P.2d 840, 843 (Wash.Ct.App.1978) (holding that under Wash. Rev.Code § 30.30.020, the predecessor statute to § 11.106.020, "[t]he trustee or trustees must provide an accounting at least annually"). The bankruptcy court did not err in so concluding.

VII

Ms. Snavely contends that the bankruptcy court erred in concluding that Mr. Miller was not liable for debts incurred by the Trust before its creation. Her reliance on Wash. Rev.Code

§ 11.18.200(1) is misplaced. Ms. Snavely incurred the expenses for the care of her mother from mid-1991 through August 1995. Mr. Miller was not a "beneficiary of a nonprobate asset" from mid-1991 to 1993 within the meaning of Wash. Rev.Code § 11.18.200(1) because none existed at that time.

VIII

Ms. Snavely contends that the bankruptcy court's finding that rental income from the guest house was Trust income as opposed to a loan from Ms. Snavely to the trust is clearly erroneous. CPA James Galipeau testified that Ms. Snavely's bank accounts contained no reference to loans to the Trust. The bankruptcy court found Mr. Galipeau's testimony credible. The bankruptcy court's finding that the rental income from the guest house was a Trust asset is supported by the record and is not clearly erroneous.

IX

Ms. Snavely also contends that the bankruptcy court clearly erred in finding that the probate fees she requested as part of the Trust's proof of claim were duplicative of the services provided by her chapter 11 counsel and that the probate fees she had already paid the probate attorneys were sufficient. The bankruptcy court's findings were based on John Sherwood, Sr.'s testimony that Ms. Snavely's fees for her administration of the estate were unreasonable and improper. The bankruptcy court found Mr. Sherwood's testimony, which was not contested by probate counsel, to be credible. The bankruptcy court's findings were not clearly erroneous.

X

Ms. Snavely further contends that the bankruptcy court's finding that the promissory notes for her alleged loans to the Trust "appear to have been prepared at the same time" is clearly erroneous. The bankruptcy court reviewed trial exhi-

bits of the 42 promissory notes Ms. Snavely submitted to substantiate loans she allegedly made to the Trust. The bankruptcy court found Ms. Snavely's accounting to be inaccurate and that the exhibits were prepared after the fact. The bankruptcy court's finding is supported by the record and is not clearly erroneous.

XI

Ms. Snavely maintains that the bankruptcy court erred in finding that she engaged in self-dealing and in concluding that she breached her fiduciary duties as Trustee of the Trust. Trust and probate expert John F. Sherwood testified that Ms. Snavely's personal representative fees charged to the Trust were unreasonable and that her failure to comply with the Trust's requirements was a breach of her fiduciary duties. The bankruptcy court found this testimony to be credible. It did not err in concluding Ms. Snavely breached her fiduciary duties as Trustee of the Trust.

XII

Ms. Snavely asserts that the bankruptcy court did not have jurisdiction over Mr. Miller's tortious interference with business interests claim because the claim constituted a "personal injury tort" under 28 U.S.C. § 157(b)(5) which the district court, not the bankruptcy court, must adjudicate. Under Montana law, Mr. Miller's claim for tortious interference is not a personal injury tort. The elements of this claim are that the defendant engaged in acts that (1) are intentional and willful; (2) are calculated to cause damage to the plaintiff's business; (3) are done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) result in actual damages or loss. *Maloney v. Home and Investment Center, Inc.*, 298 Mont. 213, 994 P.2d 1124, 1132 (2000). The focus is on business loss, not personal injury. The bankruptcy court found that Ms. Snavely acted intentionally and that her actions wrong-

fully interfered with Mr. Miller's legal right to access and enjoyment of his property. The record supports these findings.

XIII

Ms. Snavely also asserts that the bankruptcy court's determination that she tortiously interfered with Mr. Miller's business interests is erroneous because none of her acts were wrongful and tortious and Mr. Miller suffered no damage. The bankruptcy court considered all of the evidence, including the testimony of Ms. Snavely concerning her placement of a gate across the only access to Mr. Miller's property, the testimony of Dr. Glenn Jarrett that he had trouble accessing Mr. Miller's property when he considered buying it, and evidence that Ms. Snavely granted an easement over Mr. Miller's property to a third party without Mr. Miller's consent.

The bankruptcy court found that Mr. Miller presented undisputed credible testimony of a financial resources management expert that based on Dr. Jarrett's offer of $695,000, with a 10.5% capitalization rate, Mr. Miller would have earned $72,975 per year. The expert calculated that from January 2000 to September 1, 2001, the loss to Mr. Miller was $127,706. The bankruptcy court did not err in concluding that Ms. Snavely tortiously interfered with Mr. Miller's business interests or in awarding Mr. Miller damages based on Ms. Snavely's tortious conduct. *See Bolz v. Myers*, 200 Mont. 286, 651 P.2d 606, 613 (1982) ("loss of profits on a reasonable basis for computation and the best evidence available under the circumstances will support" the determination of damages by the court). The court's calculation was based on undisputed and credible evidence.

XIV

Ms. Snavely further asserts that the bankruptcy court erred in awarding Mr. Miller $75,000 based on a claim for intentional infliction of emotional distress because Mr. Miller did

not assert this claim in his complaint and it was not set forth in the pretrial order. The bankruptcy court did not award damages based on a claim for intentional infliction of emotional distress. In analyzing Mr. Miller's claim for tortious interference with business interests, the bankruptcy court stated: "Miller's claims for relief include the tort of intentional infliction of emotional distress *through* tortious interference with business relations." Under Montana law, emotional distress damages may be awarded for a violation of the tort of intentional interference with business interests. *Maloney*, 994 P.2d at 1137.

XV

Ms. Snavely argues that the bankruptcy court erred in awarding Mr. Miller $72,000 as punitive damages because it failed to make findings of fact concerning eight of the nine factors necessary for an award of punitive damages under Mont.Code Ann. § 27-1-221(7)(b). In its order, the bankruptcy court made adequate factual findings on the factors required by Mont.Code Ann. § 27-1-221(7)(b). The bankruptcy court made specific findings on the actual damages Mr. Miller suffered and on Ms. Snavely's worth, which it found to be $3,685,521. The record supports the bankruptcy court's findings that Mr. Miller is entitled to an award of punitive damages under the relevant factors of § 27-1-221(7)(B) and that Ms. Snavely acted with actual malice. *See* Mont.Code Ann. § 27-1-221(1); *Rasmussen v. Fowler*, 245 Mont. 308, 800 P.2d 1053, 1056-57 (1990) (court concluded that actual malice for purposes of an award of punitive damages is present where a party blocks access to property after being told that access was to remain open).

XVI

Ms. Snavely alleges that the bankruptcy court erred in awarding Mr. Miller attorney's fees because she was not required to grant Mr. Miller a utility easement and because

her reason for locking the gate on Amigo Drive was to prevent vandalism. The bankruptcy court considered all of the evidence, including the testimony of Dr. Jarrett, who testified concerning the trouble he had in accessing the property when he was considering buying it. The bankruptcy court's award of attorney's fees was clearly within the bankruptcy court's discretion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

[Filed March 10, 2003]

CV 02-23-M-DWM

In re: DOUGLAS E. MILLER, Debtor.

ORDER

United States Bankruptcy Judge John L. Peterson entered an Order January 25, 2002, dealing with several issues in the adversary proceeding between Bonnie Snavely and Douglas Miller. Both parties appealed to this Court. This Order addresses the issues in Snavely's appeal.

I. Background

Snavely filed a proof of claim of $240,000 against Miller's bankruptcy estate. The Margueritte L. Miller Trust, with Snavely as Trustee, filed a proof of claim for $603,906.12. Miller objected to both of these claims. Meanwhile, Miller had filed an action in Montana District Court alleging several claims against Snavely. These claims were referred by this Court to the Bankruptcy Court and became Miller's counterclaims in the adversary action. Miller's claims included the request for an accounting of the Margueritte Miller Trust, the removal of Snavely as Trustee, a judgment divesting title to an easement, injunctive relief and punitive damages. A trial was held in Bankruptcy court from October 29 through November 2, 2001, on these proofs of claim and counterclaims.

The Final Pretrial Order for the adversary proceeding included claims by Miller for determination of easement rights and related injunctive relief, breach of fiduciary duty, removal of Snavely as Trustee, breach of the common law duty of good faith and fair dealing, tortious interference with business relations, punitive damages based upon malice and fraud, partition of Trust property, actual fraud, specific performance, breach of contract, accounting, and attorney's fees.

Judge Peterson's order sustained Miller's objections to Snavely's proof of claim, and sustained in part and overruled in part Miller's objections to the claim of the Margueritte L. Miller Trust. He also found for Miller on Miller's claims for damages and on his Rule 70 motion. The claim for the removal of Snavely as Trustee was declared moot as the Trust itself had expired. Order, 39.

II. Snavely's Appeal of January 25th Order

Appellant Snavely makes nine arguments in her appeal, raising two procedural issues and seven substantive issues.

First, she argues that this appeal should be stayed pending the resolution of three appeals to the 9th Circuit Court of Appeals in this matter. These appeals deal with jurisdiction, and if the 9th Circuit concludes that the Bankruptcy Court did not have proper jurisdiction to decide the matters it decided, then Judge Peterson's January 25th order will be vacated. Brief, 10.

Second, Snavely argues that the adversary proceeding at issue here is not a core proceeding in Mr. Miller's bankruptcy case. *In re Yochum*, 89 F.3d 661, 670 (9th Cir. 1996) lists the factors to be considered in determining whether a matter is a core proceeding in a bankruptcy case. The factors include: whether the rights involved exist independently of Chapter 11, whether the rights involved depend on state law for their resolution, whether they existed prior to the filing of the bankruptcy petition, and whether they were significantly af-

fected by the filing of the Bankruptcy petition. 28 U.S.C. § 157(b)(2); *In re Cinematronics, Inc.*, 916 F.2d 1444, 1450 FN 5 (9th Cir. 1990).

Snavely claims that the result of this analysis is the conclusion that Miller's claims are not core to his bankruptcy action. His rights exist independently of Chapter 11 and existed prior to filing his petitions. Second, state law governs the resolution of his claims. Finally, Miller's claims "need not have been not significantly [sic] affected by the filing of the Bankruptcy Petition." Snavely's Brief, 12. If the matters decided in Judge Peterson's January 25th Order are not core proceedings, the [sic] he is required to submit findings of fact and conclusions of law to the district court, for the district court judge to review de novo and to enter the final order. 28 U.S.C. §157(c).

Snavely's third argument is that the Bankruptcy Court erred by not barring several of Miller's claims for reasons of res judicata, collateral estoppel, and/or accord and satisfaction. Snavely argues that a number of Miller's claims were received in her own bankruptcy action in the Western District of Washington in 1995. Miller's claims for breach of fiduciary duty, accounting and division of the trust property were all dismissed by that Court. Snavely's Brief, 13. Second, Miller's claims that would have been subject to Snavely's Chapter 11 Plan of Reorganization are barred by res judicata, since a reorganization plan operates as a final judgment. *First Union Comm. Corp. v. Nelson Mullins Reilly & Scarborough*, 81 F.3d 1310 (4th Cir. 1996). Brief, 13. Also, Miller's easement claims were released in a settlement relating to his mother's bankruptcy in 1994, and therefore the claim is barred here by accord and satisfaction.

Fourth, the Bankruptcy Court erred in its resolution of a number of issues dealing with the Trust accounting, The Court erred in not accepting the Washington Court's accounting. Neither Washington statute nor the Trust itself required

an annual accounting or audited accounting, as suggested by Judge Peterson's conclusions. Brief, 14. Judge Peterson also erred in his conclusion that Snavely's loans to the Trust constituted commingling and in disallowing many of the expenses claimed by Snavely in her Proof of Claim. These findings were not supported by the evidence.

Fifth, while Judge Peterson did not expressly find Snavely breached her fiduciary duty, the Court awarded Miller attorney's fees based on a breach of duty. Snavely argues that the Trust was structured to allow her great discretion in the use of Trust property, and that Washington law subjects a trustee to an abuse of discretion standard, which arises only when a trustee acts arbitrarily, in bad faith, maliciously, or fraudulently. Snavely did not do so. Brief, 15,

Sixth, Snavely appeals the Bankruptcy Court's conclusion that she tortiously interfered with Miller's business interests. Miller failed to prove each element of his claim, according to the factors in *Maloney v. Home & Inv. Ctr., Inc.*, 298 Mont. 213, 224, 994 P.2d 1124, 1132 (Mont. 2000): 1) an intentional and willful act 2) calculated to cause damage to plaintiff's business, 3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor 4) resulting in actual damage or loss. Snavely contests a number of Judge Peterson's factual conclusions on this issue, including arguing that Miller suffered no damages, because his failure to sell the property to the Jarretts resulted in him still having the property, which is now worth more than it would have been then. Brief, 17.

Seventh, the Court erred in awarding Miller damages for intentional infliction of emotional distress because this claim is a personal injury tort and not within the scope of the Bankruptcy Court's jurisdiction. 28 U.S.C. § 175(b) (5). Also, the claim was not included in the Final Pretrial Order, and Miller did not provide enough evidence to establish intentional infliction of emotional distress. Brief, 18.

Eighth, the Bankruptcy Court should not have awarded punitive damages to Miller because Miller did not show any economic loss due to Snavely's conduct, and Washington state law disallows punitive damages resulting from a trustee's conduct.

Finally, Snavely claims she acted entirely within her rights with respect to the utility easement claimed by Miller and therefore Miller should not be awarded attorney's fees for his Rule 70 motion.

Appellee Miller responds to these nine issues as follows. First, Snavely originally filed with this court a list of 176 issues on appeal. In her brief, Snavely fails to address over 160 of those issues and they therefore should be dismissed. Bankruptcy Rules 8006 and 8010. Miller cites *U.S. v. Voigt*, (89 F.3d 1050, 1064 FN 4 (3rd Cir. 1996), cert. denied 519 U.S. 1047 (1996)) for the proposition that "[t]he failure to raise a theory as an issue on appeal constitutes waiver, [and] briefs must contain statements of all issues presented for appeal, together with supporting arguments. . . "

Second, Miller denies that his claims are barred by res judicata, collateral estoppel and/or accord and satisfaction. First, Snavely's disputes regarding Miller's easement claim were already decided, appealed to this Court and affirmed, and are now on appeal to the Ninth Circuit. Second, the incidents giving rise to Miller's claims here occurred in 2000 and 2001, or are ongoing; in either case, they arose after the 1994 Settlement Agreement and 1997 Chapter 11 plan and dismissal. Therefore, these claims are not barred by those earlier judgments.

Third, regarding Snavely's disagreements with the Trust accounting, Miller argues that the Bankruptcy Court is not clearly erroneous in its conclusions and therefore should be upheld. Judge Peterson performed a difficult task of fact finding, and this Court should not overturn his determinations without clear evidence of mistake.

Fourth, Miller argues that Judge Peterson's determination that Snavely breached her fiduciary duties was also not clearly erroneous. At trial, expert John Sherwood testified, without contradictory testimony from Snavely, to Snavely's breaches of fiduciary duty. Miller's Brief, 9.

Fifth, the Bankruptcy Court's determination that Snavely tortiously interfered with Miller's business interests was likewise not clearly erroneous. Snavely's allegations of factual error on the part of the Bankruptcy Court are not sufficient to require this court to find Judge Peterson clearly in error.

Sixth, Miller rebuts Snavely's argument about emotional distress damages not being in the final pretrial order with a citation from that order, page 25, in which Miller asks for general damages, including emotional distress. *Sacco v. High Country Independent Press*, 271 Mont. 209, 230 896 P.2d 411 (1995), established emotional damages as an independent tort in Montana but also preserved it as an element of general damages relating to other torts. *See also Maloney v. Home & Inv. Ctr., Inc.*, 994 P.2d 1124 (Mont. 2000). Judge Peterson concluded there was enough factual support for the elements of this claim. Miller's brief, 14.

Seventh, Miller argues that Snavely's actions amount to actual fraud and malice under Montana law and therefore should be subject to punitive damages. Mont. Code Ann. §27-1-221(7)(b).

[MISSING TEXT] she was entitled to do, and Judge Peterson's Order here deals with issues that are not on appeal from the Washington cases. Miller also argues that his counterclaims would not be reversed by the Ninth Circuit's reversal.

Finally, Miller relies on 28 U.S.C. §157(b)(2)(B)'s list of core proceedings to argue that these claims against his estate are in fact core proceedings. Miller's Brief, 18-19.

III. Standard of Review

A district court hearing a bankruptcy court's decision on appeal reviews the bankruptcy court's conclusions of law de novo. Bankruptcy Rule 8013 provides, in part, that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

Factual determinations are reviewed deferentially because they are based on credibility determinations. *Rand v. Rowland*, 154 F.3d 952, 957 FN 4 (9th Cir. 1998) (en banc). Only when it is clear that the court made a mistake will the appellate court overrule factual conclusions. *In re Contractor's Equipment Supply Co.*, 861 F.2d 241, 243 (9th Cir. 1988).

IV. Analysis

First, a preliminary note: especially in her reply brief, Snavely repeatedly asks this Court to second-guess the findings of fact of the Bankruptcy Court. Judge Peterson was in the position to view the witnesses, hear the testimony, and weigh credibility. He held Snavely's credibility in low regard, based on his observation of her testimony and the testimony of others, and he did not believe a number of her factual assertions. 1/25/02 Order, 7 ¶2, 13 ¶2. My review of these findings is for clear error; I will not do what Snavely repeatedly asks—that is, to overturn Judge Peterson's reasonable factual conclusions based on the record and proceedings before him.

1. Stay

Snavely's request for a stay pending the fate of her other appeals fails to conform with Bankruptcy Rule 2005 and is therefore denied.

2. Core proceeding

28 U.S.C. §157(b)(2) is an inexhaustive list of core proceedings. 28 U.S.C. §157(b)(2)(C) expressly includes counterclaims by the estate in the list of core proceedings. Section 157(b)(2)(O) includes "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity-security holder relationship, except personal injury tort or wrongful death claims." Section (2)(B)(3) goes on to say "A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."

Based on these provisions, I concur with Judge Peterson's assessment that Miller's claims were core proceedings within the meaning of §157. Miller's counterclaims are explicitly deemed core claims by statute. In addition, personal injury claims that are claims of the estate against others are considered core claims. *In re Manning*, 71 B. R. 981, 984-5 (N.D. Ala. 1987).

3. Res judicata, collateral estoppel, and/or accord and satisfaction

Judge Peterson concluded that the events at issue occurred in 2000 and 2001 or were ongoing, and therefore Miller's claims were not barred by Snavely's Washington bankruptcy, the expiration of the Margueritte Miller Trust, or Snavely's reorganization plan. These are factual determination [sic] in which I find no clear error.

4. Trust accounting

Judge Peterson's analysis of the trust accounting evidences great attention to the record before him and involves numerous factual conclusions. There is nothing in his analysis or the record before me that suggests he was erroneous.

5. Breach of fiduciary duty

Judge Peterson found that Bonnie Snavely had breached her fiduciary duty both in her treatment of trust funds and in her interactions with Miller in his property dealings when she was Trustee. Order, 14, 16, 37, 47. The breach of her duty regarding accounting issues could have, as Judge Peterson pointed out, resulted in her Proof of Claim being disallowed altogether. Order, 37. Regarding Miller's counterclaim, Judge Peterson considered Snavely's breach of duty as a contributing factor to her interference with Miller's business relations. This view was based on several of Judge Peterson's factual determinations, none of which is clearly in error or is subject to reversal by this Court.

6. Tortious interference with business interests

Judge Peterson specifically relied on *Maloney v. Home & Inv. Ctr., Inc.*, 994 P.2d 1124, 1132 (Mont. 2000) and *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 220, 238, 896 P.2d 411, 417, 429 (1995) in his assessment of Miller's claim. He determined, based on the evidence at trial, that Snavely's actions met the legal tests, established in those cases, for tortious interference with business interests, especially as her actions affected Miller's use of his land. Order, 42-48. Judge Peterson specifically rejected the claim that Snavely makes here, that the increase in property value somehow palliates the damage suffered by Miller through Snavely's interference. Order, 47-50. Judge Peterson need not consider every possible permutation of events that could or could not have occurred following Snavely's tortious act. He simply calculated what would have happened if the sale proceeded as planned and assessed that lost value as damages. Judge Peterson applied the correct legal test, and there is no clear error evident in his fact-finding. Therefore, his conclusion is upheld.

7. Damage award for emotional distress

This tort claim was properly before Judge Peterson under § 157 (b)(2)(C), as decided above. Snavely's arguments regarding the Final Pretrial order and Judge Peterson's findings of fact are equally unpersuasive. These damages flow from the tortious interference with business claim.

8. Punitive damages

Punitive damages are available for intentional infliction of emotional distress in Montana. *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 472-73, 686 P.2d at 213 (1984); *Miller v. Watkins* (1982), 200 Mont. 455, 468, 653 P.2d 126, 132; *Sacco*, 271 Mont. at 238, 896 P.2d at 428. Having concluded Snavely's tortious acts were intentional, Judge Peterson was correct in assessing punitive damages. His Order contains sufficient evidence, based on his analysis of the evidence at trial, to support his conclusion of intent and malice.

9. Easement

The Bankruptcy Court concluded that Snavely had directly disregarded its Order regarding an easement on Miller's property. Judge Peterson found that

> "[l]ike the evidence in *Columbia Gas*, [cited in the Order, at 51] which suggested that non-compliance resulted from more than just neglect or carelessness, the evidence here rises to the level of obstinence and recalcitrance. Snavely not only failed to delineate by survey the right-of-way and access over Amigo Drive, but she took the undisputed steps to restrict the assets by lock and chain on the gate she placed across the right-of-way. Rather than seek clarification of this Court's Order as to time or any other matter, she took affirmative steps to restrict access."

Judge Peterson has the inherent authority to enforce orders of the Court. His determination that Snavely's actions were in

clear and deliberate contradiction of an Order of the Court is not clearly erroneous and is therefore upheld.

It is therefore HEREBY ORDERED that Judge Peterson's Order of January 25, 2002, is AFFIRMED in all respects.

Dated this 10th day of March, 2003.

/s/ Donald W. Molloy
DONALD W. MOLLOY, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

[Filed January 25, 2002]

Case No. 01-30752-11
Adv. No. 01/00043

In re: DOUGLAS E. MILLER,
Debtor.

DOUGLAS E. MILLER,
Plaintiff,

vs

BONNIE SNAVELY, Individually and as Trustee of the Margueritte L. Miller Living Trust,
Defendant.

ORDER

At Butte in said District this 25th day of January, 2002.

On November 27, 2001, this Court entered a "Decree of Partition and Order Granting Easement" (hereinafter "Decree") in this adversary proceeding, which decreed rights of the parties to property known as the "Kona Ranch", Missoula County, Montana. Reference is hereby made to that Decree, which includes a recitation of the legal matters and issues raised by the parties. This Order decides the final issues in this adversary proceeding dealing with Bonnie Snavely's ("Snavely") Proofs of Claim in the sum of $603,906.12 and counterclaim of Douglas Miller. Snavely's counsel William, Kotner & Jabbs' Proof of Claim in the amount of $240,000

based on malicious prosecution was denied by the Court at trial. Plaintiff's damage allegations raised as a counterclaim to Snavely's Trust administration claim were tried during this phase of the proceeding.

Plaintiff Miller, as debtor-in-possession ("DIP") has asserted a counterclaim in his complaint against Snavely for injunctive relief, breach of fiduciary duty, removal of Snavely as Trustee of the Living Trust of Margueritte M. Miller (the "Trust"), deceased, breach of common law good faith and fair dealing; tortious interference with business relations, punitive damages based upon malice and fraud, actual fraud, specific performance, breach of contract, accounting and attorneys' fees.

Trial of this matter was held before the Court commencing October 29, 2001, and concluding November 2, 2001. Miller was represented by counsel Lon Dale and Jon Binney, and Snavely was represented by counsel Scott Henrie, Edward Murphy and James A. Patten, the latter appearing for the Trust. Exhibits entered in the easement portion of this case tried June 18, 2001, are deemed exhibits in the record ("Ex.").

The following additional exhibits were admitted into evidence: 18, 19, 20, 21, 22, 23, 24, 25, 27, 29, 30, 32, 33, 35, 39, 40, 42, 44, 44A, 45, 46, 47, 48, 49, 53, 54, 55, 56, 57, 58, 59, 62, 64, 66, 68, 69-1, 69-2, 69-3, 69-4, 69-5, 69-6, 69-7, 69-9, 69-10, 69-11, 69-12, 69-13, 69-14, 69-15, 69-16, 69-17, 69-18, 69-19, 69-20, 69-21, 69-22, 69-23, 69-24, 69-25, 69-26, 69-27, 69-28, 69-29, 69-30, 69-31, 69-32, 69-33, 69-34, 69-35, 70A, 70B, 70-1, 70-2, 70-3, 70-4, 70-5, 70-6, 70-7, 70-8, 70-9, 70-10, 70-11, 70-12, 70-13, 70-14, 70-15, 70-16, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 85, 86, 501, 502, 506, 507, 509, 523, 524, 525, 527, 528, 529, 530, 531, 532, 533, 534, 535, 538, 539, 540, 541, 542, 543, 544, 545, 564, 568, 578, 584, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 635, 636, 637, 649, 650,

651, 652, 656, 669, 669-A, 670, 671, 672, 673, 674, 675, 676, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691 and 693. Exhibits 67, 505, 653 and 692 were refused admission into evidence.

Post-trial briefs and proposed findings of fact and conclusions of law have been filed by the parties.

The Court reaffirms the statement of jurisdiction contained in the Decree and Order of November 27, 2001. In addition, the parties have agreed in the Final Pretrial Order entered October 19, 2001, as follows:

I. The requisite jurisdictional requirements for federal court jurisdiction are satisfied as the DIP and defendant are citizens of different states.

This Order deals with the Proofs of Claim and Miller's damage claims. The matter is ripe for decision.

DISCUSSION

A Proof of Claim filed in a chapter 11 case is only mandated if the claim in the debtor's schedules is listed as disputed, contingent or unliquidated. F.R.B.P. 3003(a)(1). Debtor's schedules list Bonnie Snavely as an unsecured creditor in Schedule F as "disputed". Consequently, Snavely filed her Proof of Claim as a secured claim on July 2, 2001, for "Administrative expenses of Trust" from 1993 to current date in the sum of $603,906.12. Snavely attached thereto a statement that the Margueritte L. Miller Living Trust (hereinafter the "Trust"), with Bonnie Snavely as trustee, expended $1,803,318.35 including interest at the statutory rate of 12% through the date of the Miller Chapter 11 petition, based on a Mountain West bank loan of $220,00 plus accrued interest estimated at $14,209.59, amounts detailed in the Internal Revenue Service Form 706 (Ex. 538) in the amount of $323,575.88, claims for reimbursement between 8/26/95 and 8/26/00 ($929,117.32), interest ($84,616.80), loans to trust

($24,000), expenses paid by trustee ($18,900), trustee's fees ($25,500), trustee's attorney fees and expert witness fees ($163,587.80), for a total of $1.803,318.35. The attachment asserts the Debtor owes 1/3 of that amount. The claim attaches an accountant report prepared by Anderson, Zurmuehlen & Co. (Ex. 524), and a Profit and Loss Statement from August 26, 1995, through August 26, 2000, which in part incorporates Ex. 525.

Two other Proofs of Claim were filed on July 19, 2001, which are duplicate claims, claiming attorney's fees and costs incurred by Snavely in connection with the Miller Trust accounting in the sum of $240,000.00. In addition, these claims seek recovery of attorney fees and costs based on theories of malicious prosecution and abuse of process. Objections were filed to both claims and these claims were denied at the end of the trial without prejudice.

In re Allegheny Intern., Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992) states the applicable bankruptcy law regarding the burden of proof on a proof of claim:

> The burden of proof for claims brought in the bankruptcy court under 11 U.S.C.A. § 502(a) rests on different parties at different times. Initially, the claimant must allege facts sufficient to support the claim. If the averments in his filed claim meet this standard of sufficiency, it is "*prima facie*" valid. *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, *Collier on Bankruptcy* § 502.02, at 502-22 (15th ed. 1991)). In other words, a claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector to produce evidence sufficient to negate the prima facie validity of the filed claim. It is often said that the objector must produce evidence equal in force to the prima facie case. *Id.*; *see In re Windsor Communications Group, Inc.*, 45 B.R. 770,

773 (Bankr. E.D.Pa.1985). In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. *See In re WHET, Inc.*, 33 B.R. 424, 437 (Bankr.D.Mass.1983). The burden of persuasion is always on the claimant. *Holm*, 931 F.2d at 623 (quoting *Collier* § 502.02, at 502-22); *Windsor Communications*, 45 B.R. at 773.

If an objection is made to a proof of claim, the ultimate burden remains on the claimant to prove the validity of the claim by a preponderance of the evidence. *In re Harrison*, 987 F.2d 677, 680 (10th Cir. 1993).

In the case *sub judice*, the Debtor has raised enough serious questions concerning the final accounting of the Trust that the validity of the first Proof of Claim has been sufficiently challenged. For example, it is clear from the record that the Trustee Snavely never filed an annual accounting with or provided an annual accounting of her financial transactions to the beneficiaries of the Trust. The Trust instrument, section 10.04 specifically requires the Trustee "shall render annual reports to each beneficiary . . . showing the assets of such trust and all receipts, disbursements and distributions during the period." This means written reports since the duty further provides the Trustee's record shall be open at all reasonable times to inspection by the beneficiaries. Moreover, Washington trust law, section 11.106.020 WCA, requires the trustee to provide annual accountings to the beneficiaries. The only accounting made was in November, 2000, upon court order, and after the Trust had expired by its own terms.

Further, Snavely hired a bookkeeper, Jacquie McGuire ("McGuire"), in May 1997, 4 years after the Trust began, who looked at the books and records, stated some were not readable, reconciled 5 different accounts which took over 6 months to "get up to speed", relied on Snavely alone to substantiate and explain most book entries, and then had to estimate the validity of the entries because of lack of records for the years 1992 and 1993. McGuire testified that old deposit slips were not available for 3 different bank accounts in the April "93 Range", and McGuire determined whether they were trust accounts or Snavely's individual accounts. So, she stated her sole source of assignment to the proper account came from Snavely and if a check was listed as "trust", it was posted as such "unless it was so far off it made no sense." In sum, there were not contemporaneous compilations or verification of the income and expenses on an annual basis.

Even the post-trial brief of Snavely states "There are some problems with the documentation supporting this claim [of $200,000]. It is believed that some of the records were misplaced in the litigation involving not only Douglas Miller, but First interstate Bank. As a result, few to none of the bank records from 1992 to about March or April of 1993 survived except for a series of checks totaling $12,300 representing partial reimbursement to Bonnie Snavely for expenses she incurred to care for her mother."

Snavely also violated court orders on authorized disbursement of proceeds derived from the settlement of the First Interstate Bank law suit of $952,000, in failing to pay certain debtors of Margueritte. Ex. 24. That order reimbursed Snavely in the amount of $144,002.40 for funds she represented as loans in payment of pre-petition creditors of the Margueritte Miller chapter 11 bankruptcy estate, but that specific sum is not shown in the only accounting. Ex. 525. This matter will be addressed *infra*.

Next, attached to the proof of claim is the summary of account of the Trust by her accountants Anderson Zurmeuhlen & Co., Ex. 524, which recites:

> "A compilation is limited to presenting in the form of financial statements information that is the representation of the Trustee of the Margueritte L. Miller Trust. We have not audited or reviewed the accompanying statements and accordingly, do not express an opinion or other form of assurance on them."

CPA Joe Wilcynske, who prepared Ex. 524, stated that exhibit is a compilation that does not require full disclosure. As an example, Ex. 524, page 6, lists "Additional costs incurred for Trust debts" of $86,794.95, but he confessed he had no detail what was included in that sum, or for what item the money was used. He surmised on re-direct examination that sum may have been difference in interest, fees and costs between what was owed Federal Land Bank and what was paid. This item clearly lends itself to pure speculation.

All of these deficiencies, and others to be discussed herein on items claimed due, raise sufficient doubt as to the accounting which requires the claimant Snavely to bear the burden of proof by a preponderance of the evidence to substantiate the claim of $603,906.12. *See In re Allegheny Intern., Inc.*, 954 F.2d at 173-74.

Further, Snavely's credibility in handling the funds of the Trust is indeed an issue. Her credibility on money matters is best described by her brother Phillip Miller, who stated giving Snavely money was like giving a 15 year old a bottle of whiskey and keys to a car, inferring both are irresponsible. Having observed Bonnie Snavely's demeanor while testifying under oath over several days, as well as having observed the several other witnesses who contradicted her testimony in several areas discussed more fully below, this Court finds that Bonnie

Snavely is not a credible witness[1]. *In re Taylor*, 514 F.2d 1370, 1373-74 (9th Cir. 1975); *See also*, *Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998).

FINDINGS OF FACT

Before the Trust was executed on April 5, 1993, Snavely in mid-1991 undertook the care of Margueritte. At that time, First Interstate Bank was trustee of Margueritte's affairs and interests in the Kona Ranch. A dispute arose between Snavely and the Bank, and Snavely ultimately became successor trustee. Ex. 544, 545, 11, 12. Snavely, with Margueritte's power of attorney, Ex. 69-1, filed chapter 11 bankruptcy for Margueritte on June 21, 1993. On November 1, 1993, this Court, relying on Snavely's testimony, found that Snavely managed Margueritte's daily affairs and that "Snavely has advanced in excess of $150,000 for the care and welfare of Debtor from Snavely's own funds." Ex. 680. The Court relied solely on Snavely's testimony for such finding. It is thus clear, however, that most of such expenditures, if spent, predated the execution of the Trust. Ex. 69-26 (see ftn. 2 *infra*). Such being the case, no claim for such funds which were expended before April 6, 1993, can he made against Miller's 1/3rd interest in the Trust property. Snavely's proof of claim, and Ex. 525, attached to the claim, recognizes such fact as the claim states the "Date debt was incurred: 1993—current date." According to the claim, the total expenditures, debts, trustee's claims for fees, loans, advances and attorney's fees total $1,803,315.35. Miller, under the claim, is charged with

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[1] In previous hearings held in this case and in the Margueritte Miller chapter 11 case, Bonnie Snavely had testified in more limited contexts, and the Court concluded she was credible. Now, however, with the benefit of a more complete record of her manipulations with the family Trust, estates, and responsibilities with which she was entrusted or assumed, the Court concludes, with chagrin, that it was led down the primrose path in believing Snavely, just as were so many others who trusted and believed her.

1/3rd of the alleged obligation, in the sum of $603,906.12. If the value of the entire Kona Ranch is placed at $1,720,000 (Ex. 70-7), then the Snavely Proof of Claim, if allowed in full, would dissipate completely Miller's inheritance. Such hardly seems like a just result where the Trust was created to grant Miller that inheritance. Moreover, during the administration of the Trust, the First Interstate lawsuit produced $537,507.07 in net proceeds to pay creditors and the beneficiaries of her will. That matter will be further discussed in this Order. Yet, presently property taxes are delinquent, loans are in default and lien foreclosures are pending. It is mandatory, therefore, that the Proof of Claim be critically examined in the interests of Miller's ability to propose a feasible chapter 11 reorganization plan based on his share of the Trust estate.

At the beginning of Snavely's trusteeship, Snavely negotiated 3 loans through Creative Finance, to-wit:

1. Myers note—$50,000—date 4/3/93—net to Trust—$17,709.00. Ex. 578

2. Sousa note—$50.000—date 5/14/93—net to Trust—$45,532.00. Ex. 568

3. Gingerich note—$65,000—date 6/16/93—net to Trust $49,171.00. Ex. 561

Interest payments on the Gingerich loan were charged against the Trust, even though the mortgage was against Snavely's personally owned Tract EE. Ex. 525. There is no entry of interest expense paid on the Sousa note.

On April 13, 1999, Snavely, as trustee, borrowed $220,000 from Mountain West Bank and gave a mortgage (trust indenture) against 4 Trust parcels as collateral. Ex. 600, 601, 602, 603. The bank disbursed $99,257.43 to Snavely and paid into escrow $118,530.59 for others, who are not specified. Mountain Bank loan proceeds were used to satisfy the Gingerich note of principal and interest in the amount of $95,421.62,

Ex. 525, p. 8. Payments of principal and interest on the Gingerich note totaled $117,947.35. Thus, the Mountain Bank loan was substituted for a previous "hard money" loan. Ex. 525.

Ex. 525, p. 1 shows Snavely on 4/13/99 deposited $99,257.43 in her Key Bank account and it was designated as a "Loan #". She wrote checks to herself ($50,000), O'Rourke & Wilcynski (Estate taxes/1997 return, $7,065.25), Boyce Lumber (Chicken coop. $187.99), Margueritte L. Miller (Key Bank—$3,000), Hi County Motor (Trust—($307.14), Grass Valley French (Ditch, $1,325), Davis Wright Tremaine (Legal—$10,000), and PCI (Subdivision 17 lots/ Engineer L—$10,000), Bonnie Snavely (TransF—$5,000), and Missoula County Treasurer (Prope__$4,227.41). The $118,530.59 was paid to Insured Title Co. to pay amounts on borrowers' behalf, but no evidence has been submitted which details the distribution of that sum. Ex. 603. Ex. 54 shows "Use of Proceeds" including Gingerich loan payoff, closing costs ($3,000), taxes ($2,500), personal representative fees ($69,000), Grass Valley fees ($1,325), attorney's fees ($15,000), accountant fees ($6,439), PCI ($15,000) for a total of $207,689.00, leaving remaining funds of $12,311. Of course, these disbursements do not correspond or track with the Ex. 525, p.2, disbursements noted above. It is obvious, however, that if Snavely is given credit for part of the Mountain Bank loan, then the Gingerich "hard money" loan was substituted by part of the Mountain Bank loan, so that both loans cannot be included in the final accounting, nor can the PCI payment of $10,795.21, nor can the accounting fee of $6,926 listed in Ex. 524. They are nevertheless included in the compilation of Ex. 524, for which Miller is ostensibly 1/3rd liable.

Thus, we must examine the accounting presented by Snavely to determine the amount for which Douglas Miller may be legally obligated to pay as a 1/3 beneficiary of the Trust for the legitimate expenses incurred by the Trust for the care

of Margueritte and the Trust real property. It is and was not a simple chore.

We begin with the period of April 1993 to Date of Death—August 25, 1995. Ex. 669, 669A, and 670 are hard copies of bookkeeper McGuire's attempt to reconstruct the trust accounting of Snavely. The same attempt regarding loans appears in Ex. 656. Some other accountant had handled the matter before McGuire was engaged in May, 1997, and the records were so poor there was no way McGuire could easily reconcile the trust account for income and expenses. The exhibits as admitted were concededly erroneous when McGuire was recalled to correct the account of loans credited to Snavely in the two exhibits. Moreover, the exhibits prove the commingling of trust account funds with Snavely's personal bank accounts. Ex. 669 apparently represents a total of $113,820.09 expended by Snavely from her personal account for her mother's care. It does not include Trust funds. According to McGuire the two exhibits are supposed to also represent the basis of Snavely's claim against the Trust of $200,000 in loans, although it is conceded by McGuire there is no account to support the $200,000 loan, and McGuire said she could not "speak on that number." Ex. 669 thus was prepared from Snavely's personal bank records but was not created contemporaneously with the occurrence of each financial transaction. Ex. 670, created ostensibly from Trust bank account records, has no total sum, but McGuire testified the expenditures total $149,418 less paybacks to Snavely of $36,510.00, leaving a balance of $112,639.00. According to the exhibits, total nursing care paid was $130,549.00. It is plain from the two exhibits that loans made by Snavely are duplicated in the exhibits and upon recall McGuire confessed that the "Loans To Miller Trust" in Ex. 669 were already in the Snavely loans in Ex. 670, making an overstatement of $12,125.00. Further, upon cross examination, McGuire stated she was not sure what amount of the so-called "hard money"

loans had in fact been deposited in the Trust account for the benefit of Margueritte Miller.

The "hard money" loans described *supra* were generated by Creative Finance of Missoula, and constitute 3 separate loans. Ex. 524, p. 11, lists "Promissory noted paid Creative Finance including interest" at $149,580.56. Ex. 561, the Gingerich loan for $65,000, dated 6/16/93, provided proceeds of only $49,171.61 to the Trust. Ex. 568, the Sousa loan was for $56,000, dated 5/14/93, provided net proceeds of $45,532.00. Ex. 578, the Myers loan dated 4/8/93, was for $56,000, but only provided net proceeds of $17,709.97, because it paid off 2 previous notes, one to Haynes ($30,000) and another to Myers ($20,000). The sum of $17,709.97 does not correspond to any deposit of such amount in either Ex. 669 or 670. Ex. 670 does show a loan deposit of $16,342.00, but such deposit was made 8/02/93, 4 months after the date of the Myers note. There is an explanation for this matter. Among the exhibits introduced by Douglas Miller was Ex. 69-24, a series of checks written on the account of Mattie D. Dixon, sister of Margueritte L. Miller. One check, dated 7/30/93 (#2761) payable to "Margueritte L. Miller", and signed by Mattie D. Dixon "For Doctor expenses" is in the sum of $16,342.00, the identical amount deposited 8/2/93 in the Trust account, but listed as "Transfer from Bonnie/Loans." Ex. 670, p.16. Also, a letter dated 2/10/98 from Snavely's probate counsel [ILLEGIBLE] To Miller's counsel (Ex. 675) acknowledges that only the proceeds of two loans from "Gingerich and Creative Finance" were deposited to the mother's trust account. I find the loan proceeds of $17,709.97, as a hard loan, were never entered in either Ex. 669 or 670 as being a loan from Snavely for her mother's care.

One other matter deserves comment. Ex. 670 credits "Loans from Snavely" which were in fact from funds paid by Margueritte's sister Mattie Dixon, totaling $12,000.00. There was testimony from Snavely that these sums were the re-

sponsibility for repayment of Snavely. This brings us to the matter dealing with the claim of Snavely that all Dixon checks in Ex. 69-21 were loans to Snavely for which she was responsible. These checks total $136,728.00 (items are for personal expenses of Dixon or Snavely) for the years 1993, 1994 and 1995. Ex. 670, p. I6 claims a "Transfer for Bonnie/ Loans" of 2 additional Dixon checks, one on 2/11/94 for $5,000 another Dixon check #2995 dated 4/4/94 for $7,000. Thus, with the $16,342.00 check for "medical expenses", a total of $28,342 is claimed on Ex. 670 as loans to the Trust from Snavely. There are no promissory notes from Snavely to Dixon covering the alleged loans, nor any other documentation between Dixon and Snavely, and most checks note they are for "Margueritte".

On examination Snavely testified she transferred to her aunt Mattie Dixon, shortly before her death in 9/4/96, real and personal property inherited from Dixon's daughter in satisfaction of all loans made to Snavely by Dixon for her mother's care. Dixon's estate filed a IRS 706 tax return (Ex. 59) showing a parcel of real property valued at $87,500 and personal affects valued at $7,005. These were the properties allegedly transferred to Dixon by Snavely to satisfy the debt just prior to Dixon's death. No direct evidence was presented by Snavely by way of a deed or bill of sale to substantiate this testimony, even though Snavely testified those documents show the transfer. This is a failure to proof. Snavely filed chapter 11 bankruptcy on August 25, 1995, one day before her mother's death. In Snavely's chapter 11 bankruptcy Statement of Financial Affairs she stated that she made no payments to insiders within one year of the petition date and made no transfers of property either absolutely or as security within one year of her bankruptcy petition. Ex. 69-24 shows that within one year of the bankruptcy petition Dixon wrote checks on 11/26/94 for $5,000, 6/95 for $3,000, 10/16/95 for $3,000, 8/30/95 for $3,200, 10/30/95 for $4,000, 9/23/95 for $3,500, 9/21/95 for $3,000, 5/2/95 for $3,000, 6/3/95 for

$3,000, 7/1/95 for $3,500, 8/17/95 for $3,000, 3/4/95 for $3,000, 8/17/95 for $2,500, 3/23/95 for $3,800, 6/17/95 for $3,000 and 4/17/95 for $3,000. In the bankruptcy petition, the house and personal furnishings are not scheduled. If the alleged transfer to satisfy the loans was made over one year pre-petition, it is strange the loans kept coming within the year period of the petition and yet are claimed paid off by the transfer. If the real and personal property transfers were within one year of the petition date, they are not disclosed in Snavely's Statement of Financial Affairs. Since the property which allegedly satisfied all the loans from Dixon is not scheduled as an asset in Snavely's chapter 11 petition and no transfers are listed as being made within 1 year of the petition date, it is incredulous the Dixon payments were in fact loans to Snavely. It is more incredulous the loans were in fact satisfied by the transfer of real and personal property to Dixon from Snavely.

I simply reject Snavely's testimony as not credible that these checks were loans to Snavely for several reasons. When asked why these checks were not reported in Snavely's chapter 11 list of creditors (Schedule "F" of Ex. 618), filed one day before the death of Margueritte, her retort was "I am not an accountant or an attorney." Hardly a credible answer when one takes into consideration that her chapter 11 bankruptcy schedules were filed under penalty of perjury and before Dixon died. Her plan and disclosure statement do not mention the $136,728 "loans". Her plan confirmed on January 7, 1997 (Ex. 22) provided that scheduled [ILLEGIBLE] secured claims (class 7), in which Dixon is not listed, would be paid over 5 years. In addition, Snavely was the personal representative of the estate of Mattie Dixon, the generous sister of Margueritte, and in that probate was required by law to file a U.S. Estate Tax Return Form 706. Ex. 59. That return listed under Schedule "F" "Other Miscellaneous Property" totaling $29,045.50. Conspicuously absent from the return, filed under penalty of perjury, is the Dixon receivable based

on the alleged "loans" to Snavely, to which she testified went into her account for her mother's care! Now either Snavely's chapter 11 bankruptcy schedule is in error or Dixon's 706 return is wrong. It cannot be both ways. I conclude the money paid by Mattie Dixon for her sister's care were generous gifts not loans and Snavely cannot claim any such sums in the accounting as a charge against Miller.

Of course, Mattie Dixon died on September 4, 1996, over 3 years after Snavely became trustee of the Margueritte Miller Living Trust. Consequently, by the time the only accounting was rendered on the Trust income in November, 2000, Dixon was not available to testify. This shows the vice of Snavely's neglect to file any annual reports and accountings with the beneficiaries. John F. Sherwood, Sr., a reputable attorney from Kirkland, Washington called as an expert by Miller because his law practice specializes in estate planning, trusts and probate, and who I find to be a very credible witness whose testimony was not disputed by Snavely, testified that one of Snavely's breaches of her fiduciary duty was failure to comply not only with the reporting requirements of the Trust instrument, section 10.04 requiring annual reports, but also the Washington statutory duty to provide annual accountings to the beneficiaries. As Mr. Sherwood explained, only a compilation after the Trust terminated by its own terms (Ex. 524) was presented to the beneficiary. I would also add at this point that under the Restatement of the Law of Trusts 2d (Revised 1992), section 170 provides:

Duty of Loyalty.

(1) The trustee is under a duty to administer the Trust safely in the interests of the beneficiaries.

(2) The trustee in dealing with a beneficiary on the trustee's own account is under a duty to deal fairly and to communicate to the beneficiary all material facts the

> trustee knows or should know in connection with the transaction.

Had annual reports or accounts been communicated to Miller on a timely, annual basis, Mattie Dixon would have been available to explain why and under what circumstances she provided such generous funds to her sister. Miller lost that right as the evidence is clear Snavely never communicated with Miller at all about the Dixon transactions.

There is yet another reason to deny Snavely's claim that Dixon moneys were loans through Snavely for the Trust. As explained above, Snavely's bankruptcy proceeding filings and her administration of Dixon's estate were both accepted by the respective courts which had jurisdiction over those proceedings, yet, they are absolutely inconsistent with her present posture about loans by Snavely to the Trust. For one who raised the issue of judicial estoppel in the partition proceeding of this case, Snavely and her counsel should be very familiar with Ninth Circuit law on this subject. The decision of *Hamilton v. State Farm Ins. and Casualty Co.*, 270 F.3d 778, 782, 783 (9th Cir. 2001), cited by the Court in its November 27, 2001, partition decree, holds:

> Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-601 (9th Cir.1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).
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> * * * *
>
> The application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases. *Rissetto*, 94 F.3d at 605.

In 1996, in two separate court proceedings. Snavely took a position of non-disclosure of the alleged Dixon loans of $136,728. In this proceeding of year 2001, her claim includes, at least in part, an inconsistent judicial position where she seeks to tag Miller for a 1/3rd payment of some Dixon loans. I hold Snavely is judicially estopped to do so, and her testimony on the loans from Dixon is rejected as unworthy of belief.

Finally, at the date of the filing of Snavely's chapter 11 bankruptcy petition in the Western District of Washington, if one believes Snavely, Dixon was a creditor. Before the plan was confirmed on January 2, 1997, by Judge Steiner, Snavely had been appointed the personal representative of the Dixon estate, upon Mattie's death on September 4, 1996. As personal representative, Snavely never asserted Dixon's creditor status in the chapter 11 case of which she [ILLEGIBLE] full knowledge because she was also the debtor-in-possession. If Dixon's checks are loans, then Snavely breached her personal representative duty in the Dixon estate in a clear conflict of interest situation. This breach becomes exacerbated because she was also the personal representative of Margueritte's will and trustee of the Miller Trust. Here Snavely now tries to charge some of those alleged loans against the trust assets. For all the reasons stated herein, this Court cannot countenance such breaches of fiduciary duties by an individual wearing several fiduciary hats. Accordingly, this Order will provide for an adjustment to the loan claims of Snavely from Mattie Dixon.

Next, during the course of Snavely's cross-examination, plaintiff introduced Ex. 78, which is a paid-up oil and gas lease for trust mineral rights in Blaine County, Montana, together with a sight draft of $11,888.55, both dated October 20, 1994, which predates Margueritte's death. Philip Miller testified the brothers agreed with Snavely that their share should go for the support of their mother. When Snavely was

asked specifically whether she received such sum, she stated she did not know, but admitted the brothers had agreed to use such lease money for their mother's care. The next day of trial, Snavely presented Ex. 669A, a very suspect single-page document of two entries, which allegedly shows the money was in fact paid, and deposited into her personal account on 2/23/95. Ex. 669A shows a second entry where the amount is taken out of the account the same day. Yet, there is no entry in Ex. 669 or the trust account, Ex. 670, for a deposit of $11,888.55 on 2/23/95. In fact, Ex. 670 shows the first "Bonnie/loans" beginning 5/18/93, which is the Myers loan of $45,080.32. Ex. 669A is a sham. The lease was in the name of Margueritte Miller solely with Snavely as attorney-in-fact. Why were the funds deposited in Snavely's account, she was asked. Her answer was because it was to recover monies she had expended on her earlier. When Snavely filed her Proof of Claim in this case the $11,888.55 was never included in any attachment or compilation or listed in Ex. 669 as loans to Miller Trust (p.4). Nor does Ex. 656 show such deposit. Now, with her hand caught in the cookie jar, Snavely's post-hearing brief concedes it was Margueritte's money and should be deducted from the claim. This is clear example of not only poor record keeping of the Trust based on a convenient memory of the trustee, but an attempt to commit fraud on the Court and Douglas Miller.

We now analyze the sum of $200,000.00 claimed as a loan from Snavely to the Trust pre-death of Margueritte. This sum first surfaced on January 8, 1996, by Snavely filing a creditor's claim in the Miller probate. Ex. 19. Filed by the attorney for Snavely (Aimee S. Willig), it shows that it has never been approved by the personal representative or served on any of the heirs, including Miller. Attached to the claim is Exhibit "A", claiming "Nursing funds were advanced on behalf of the decedent prior to her death as described on the

schedules as are in the *estimated* amount of $275,600," and listed as follows:

"Professional Nurses Update—	$124,000
Individual Nurses—	102,000
Madison House	20,000
Sunset House	16,000
Angelic Quest	13,600

The claim is being made in the amount of *$200,000.*"

Examination of actual payments made on each of the above items taken from Ex. 669, 670, and 69-26 in comparison with Ex. 19 shows actual payments as follows:

Professional Nurses –	$40,410.00[2]
Individual Nurses-	82,941.97
Madison House	18,851.20
Sunset House	None
Angelic Quest ($14,307, less refund of $4000)	10,307.00
Total	$152,513.17

Ex. 669 and 670 show other expenditures in addition to those listed in Ex. 19. Ex. 670 shows "Transfers from Bonnie/loans" of $149,418.70 and "Transfers to Bonnie" of $36,510.00 for alleged net loans of $112,908.78. But as noted above, included in the transfers from Bonnie/loans were the gifts or payments from Mattie Dixon of $28,342.00, thus further reducing Snavely's alleged $200,060 advances to $80,566.78. The probate creditor's claim is clearly false if it is intended to seek payment for funds advanced solely by Snavely for her mother's care.[3]

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[2] Ex. 670 shows check 1009 dated 5/10/93, five days after the trust was created on April 5, 1993, in the amount of $36,462.59. This amount is obviously for services rendered before April 5, 1993, the date the trust was created, since Ex. 69-26 shows the total billing from 10/26/92 through 3/8/93 in the amount of $38,192.99. The claim cannot include pre-trust expenses, as explained herein.

[3] Margueritte's chapter 11 schedule "F" lists professional nursing as an unsecured creditor in the sum of $10,000.00. The creditor filed a proof of claim for unpaid services in the amount of $10,847.66 for the period from July 19, 1993, to September 4, 1993. This claim was paid from the lawsuit proceeds, not by Snavely. Ex. 24.

Snavely and her counsel in their post-trial brief discussing the $200,000 claim concede "There are some problems with the documentation supporting this claim." Few to none of the bank records from 1992 to about March or April of 1993 survived. Consequently, Snavely reduced the claim to what can actually be documented by $160,000 in order to factor out the hard money loans, leaving a net figure of $101,566.75. (Brief p. 42). They then concede the mineral lease payment should also be deducted, leaving a net figure of $89,678.19. The Snavely Proof of Claim was never amended to make this adjustment. The claim is thus intentionally over-stated.

One other comment on the alleged loans from Snavely is appropriate. Ex. 669 and 670 are inconsistent with Ex. 656. Ex. 656 is a summary of transactions by detail from 1/11/91 to 8/26/95. I noted earlier that Gingerich/Sousa net loan proceeds were shown as deposited into the trust account, Ex. 670. Yet, Ex. 656, p.1 shows the deposit into her individual account. Ex. 656 asserts loans from Bonnie of $149,498.78 but that includes $23,342 of Dixon checks. Deducting that sum the net would be $126,156.78. The exhibit then acknowledges transfers to Bonnie of $48,810, leaving a net of $77,346.78. This is inconsistent with the $200,000 claim. Ex. 656 claims total expenditures for nursing care, daily expenses, ranch expense of $160,877.96. The exhibits then adds to that sum the net advances to pay those expenses, and arrives at a total of $261,566.74. This is patently incorrect accounting. The funding of the $160,877.96 expenses came from the loans, so in truth the $160,877.96 includes the loans. Otherwise one would have a double accounting. From Ex. 656, only the $160,877.96 can be credited as expenditures for Margueritte's care. Since Snavely's Proof of Claim wants reimbursement for the Gingerich/Sousa/Creative Finance loans, then the net loan proceeds from Gingerich ($49,171) and Sousa ($45,080.32) in Ex. 656, should be deducted from the $160,877.96, leaving a net expense for the period of $66,626.63.

All matters considered I conclude the loan of $200,000 claimed in the proof of claim has not been proven by substantial credible evidence and that sum is therefor rejected as Snavely has failed in her burden of proof. Clearly, the $200,000 claim cannot be made in addition to the "hard money" loans.

The proof of claim also asserts "Interest accrued at 7.5% on the loans to the Trust" in the amount of $126,187.78. Ex. 621 and Ex. 524, p.11. The interest is computed, however, on the $200,000 phantom loan which I have rejected. While Snavely may have voluntarily now reduced her net claim to $89,678.19, after trial, there was never an amended Proof of Claim filed by Snavely to reflect this interest adjustment. Rather the interest component was calculated in Ex. 621 using the original figure of $200,000. Snavely's brief concedes the interest component should be adjusted, but nevertheless Snavely entered Ex. 621 into evidence, as well as Ex. 524, and neither exhibit made an adjustment. This entry is overstated and knowingly so. It is not the duty of this Court to compute an amount of interest. Furthermore, the interest rate of 7.5% was simply Snavely's estimate as to what was proper. It has no legal or contractual basis. Therefore, the interest component of the claim is likewise totally rejected as a total failure of Snavely's burden of proof and based on a completely erroneous figure.

Since the alleged debt of interest component was unliquidated and disputed on the date of Miller's chapter 11 bankruptcy petition, and has not been liquidated by this Court post-petition by reason of the failure of proof by Snavely as to the principal due of $200,000,000. Interest is not allowable under 11 U.S.C. § 502(b). That section provides:

> [T]he court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition,

> and shall allow such claim in such amount, except to the extent that—
>
> * * * *
>
> (2) such claim is for unmatured interest.

In re Lamarre, 269 B.R. 266, 267-68 (Bankr. Mass. 2001), citing cases dealing with 11 U.S.C. § 502(b)(2), states:

> The Bankruptcy Code, however, does not define the term "unmatured interest" or the words "matured" or "unmatured". "Laws should be examined as a whole and words given their plain meaning unless this would yield an absurd result." *Couvertier v. Gil Bonar*, 173 F.3d 450, 452 (1st Cir.1999). "Mature" means "to become due"; a "matured claim" as "a claim that is due for payment". BLACK'S LAW DICTIONARY 999 and 240 (7th ed.1999). Therefore, matured interest is interest that is due and payable; unmatured interest is the opposite, i.e., interest that is not yet due and payable.
>
> * * * *
>
> Defining "unmatured interest" as "interest not yet due and payable" may not resolve the issue, however, as the question becomes what does it mean that interest was not yet due and payable as of the petition date. In other words, can interest that would otherwise be due and owing on the underlying claim actually be due and owing "as of the petition date" if, on the petition date, the underlying claim is disputed or unliquidated or contingent? The answer, at least in those instances in which the underlying claim becomes fixed and liquidated during the bankruptcy, is yes.

However, where the claim cannot be fixed and liquidated during the claims process in bankruptcy the unmatured interest is not allowable. *In re Mattera*, 203 B.R. 565, 571 (Bankr. N.J. 1997) ("A claim is unliquidated when it is '[n]ot ascer-

tained in amount' or not 'determined'. BLACK'S LAW DICTIONARY 1557 (6th ed.1990). 'Fixed liabilities' are defined in Black's Law Dictionary as '[t]hose [liabilities that are] certain and definite as to both obligation and amount.'"

Two other components of Snavely's claim are also rejected. On April 10, 1997, this Court awarded Snavely $144,002.48 from lawsuit proceeds to pay chapter 11 prepetition debts of Margueritte. Two debts, one to Mattie Dixon in the sum of $10,750, and one to Phillip Miller in the sum of $3,698.07 were to be paid from the proceeds of the lawsuit settlement. Ex. 24. Snavely simply disregarded the court order. Neither claim was paid as ordered[4], yet Snavely had total control of the balance of the lawsuit proceeds. Ex. 525, p.2 shows a "lawsuit income" deposit of $399,411.81, together with the attorney's fees and costs, totaling $952,343.62.

The amounts approved in Ex. 24 were then recorded on pp. 7-8 of Ex. 525, plus other expenditures such as Mullin Trail, Missoula County, Triple W. Motor, Valley Motor, and Palmer Electric, which were not approved for payment out of the lawsuit proceeds in this Court's Order. I reject that portion of the Proof of Claims claiming debts for Dixon and Miller since Snavely disobeyed the court order, and those claims have never been paid by Snavely. Thus, they cannot provide a basis for a claim against Miller as asserted in Ex. 524.

The next items in the Proof of Claim deal with Snavely's request for fees both as personal representative ($69,000) and

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[4] Snavely testified she sent the $3,698 check to Philip, but it was never cashed. Philip testified he never received the check even after a court hearing where Snavely promised payment. I believe Philip. Moreover, Phillip was represented in Margueritte's case by Edward Murphy, who now represents Snavely in this proceeding. Evidently, Snavely's counsel was not able to assure Phillip's counsel that the payment was due, but not made.

trustee ($229,125.00) for a total of $298,125 for performing the same, identical duties. Ex. 524 lists the "executor's commission of $69,000, of which $57,500.00 was allegedly paid from a loan from Mountain Bank of $220,000.[5] The trustee's fees of $229,125.00 were calculated "based on an hourly rate of $75 for the term of this accounting." Snavely estimated both fees as she did not keep actual time records. The trustee's fee was computed at 10 ½ hours per week (3,056 hours) at $75.00 per hour over 5 years.

As to the personal representative fee, I adopt the trial testimony of John Sherwood, Sr. His testimony concluded that in Washington most estates are non-intervention probate, meaning little or no supervision by the court. However, in the case of awarding probate fees the personal representative must file a motion and give notice to the heirs to allow objections to be filed. The probate file does not contain such a request for fees. In fact the probate file is very sketchy, as most documents in the file are orders to show cause why the probate file is still open. Sherwood's opinion was that no personal representative fee should be allowed because of Snavely's substantial failure of performance. Sherwood stated that under Washington law if a personal representative failed to properly probate the estate a fee is not awarded or proper. Moreover, under the trust instrument annual reports or accountings to the beneficiaries are required, (Ex. 11, ¶ 10.04), but under Snavely's administration only one accounting, filed after the Trust terminated by its own terms, was filed. Further, it is important for the personal representative to timely file a federal estate tax return, which in the Miller estate meant 9 months from the date of death or May 26, 1996. This could be extended to November 1996. Snavely's

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[5] Snavely's 1999 federal income tax return (Ex. 70-15) lists "Pers. Rep. Fees M. Dixon $57,500.00". There is no explanation in the record as to this entry in the return. Further, Ex. 525. p.1, shows payments to Snavely on 4/13/99 of $50,000.00 and 4/26/99 of $5,000.00.

return was filed April 1998, without any excuse given why it was late. Moreover, the federal estate return included the $200,000 phantom loan discussed earlier as a deduction. This was an entirely improper deduction, yet no amended return has been filed.

Next, Sherwood explained the personal representative must file timely estate income tax returns. Snavely failed to do so. In fact, as Sherwood explained, the 706 tax return included the First Interstate Bank lawsuit as having a value of $26,000, when in fact the case was settled for $952,000 before the 706 return was filed. Sherwood opined the range is so out of proportion that IRS investigation (of which there is not yet one commenced) would challenge the asset value. No tax consequences have yet arisen from this matter. Further, Sherwood could find no record where the settlement income, and expense associated with it, were reported in any income tax return for the estate. There was such a return filed for the Trust, but not for the estate, and this raises a conflict of interest between the trustee and the personal representative. All matters considered, I find the personal representative charge of $69,000 is not proper in the unsupervised probate.

By comparison, Snavely acted as personal representative in both the Margueritte Miller and Mattie Dixon probates. Looking at each 706 return, the Miller gross estate was $1,106,351.00, consisting of one principle asset. Ex. 538. Dixon's 706 return showed a gross estate of $2,515,402, consisting of many assets. The personal representative fee charged in Dixon was $50,000 and the attorney's fee was $23,853.00. In the Miller probate, the personal representative fee was listed as "estimated" $69,000 and attorney's fees at $38,768.00. Snavely's request is simply unreasonable.

As to the trustee fee of $229,125.00. Sherwood was very critical of that claim. It is conceded the hours are pure estimates by Snavely. In this regard, Snavely's accountant

who prepared the compilation (Ex. 524) cautioned very clearly in Note B, p.9 as follows:

> Use of estimates.
>
> The preparation of financial statements in conformity with generally accepted accounting principles requires the trustee to make estimates and assumptions that affect certain reported amounts and disclosures. Actual results could differ from those estimates.

Here, as Sherwood pointed out, the Margueritte Miller Trust document (Ex. 11 and 12) specifically requires in ¶ 10-05 that the trustee's compensation shall be commensurate with the service "actually performed". This provision requires actual records of time, not estimates.

Sherwood also criticized the $75.00 per hour charge. He examined Snavely's tax returns for the 5 year period and found her income ranged from $4,000 to a high of $56,000. Sherwood added back the depreciation in the return and determined the reasonable average of her income was $35,000 per year, or $17.50 per hour. Then Sherwood reviewed every entry on the probate counsel's fee application and determined that from 8/95 to 8/00 Snavely had contact with her counsel at a maximum of 316 hours. Sherwood's experience was that $75.00 per hour for trustee's fees was not common in the area, and therefore was unreasonable. By simple multiplication at $25.00 per hour for hours actually documented he calculated a reasonable trustee's fee at $7,900.00. Even if Sherwood used the maximum of $75.00 per hour, the fee would be $23,000.00. I would also note that Snavely testified that after confirmation of the chapter 11 plan on January 2, 1997, the plan trustee took over the duties to administer the sale of the trust property and Snavely's individually owned tracts, and during that period through December 31, 1998, she was relieved of substantial duties over sale of trust property, a major part of her trust responsibilities. Taking that testimony

at face value, Snavely likewise should not claim or be paid any trustee's fee for those 2 years.

Since the testimony of Sherwood was not contested by the probate counsel, who did not testify at trial, I find Sherwood's testimony to be credible and adopt Sherwood's analysis based on actual hours of Snavely's contact with probate counsel and allow a reasonable trustee's fee of $7,900.00.

I find support for this allowance in other matters which are supported by the record. Snavely failed under the trust document to perform basic duties required by the trust. Article 5 requires the trustee to divide the trust into 3 separate shares for each living beneficiary and administer each share separately. The record shows commingling of the shares, particularly dealing with payment from the trust of taxes and insurance rightly belonging to the beneficiaries and not the trust. I determine this trust provision is particularly important to each beneficiary under the facts here. As shown above, after settlement of the bank lawsuit for $952,000, and payment of Margueritte's pre-death debts, a sum of $399,000 was deposited by Snavely in her bank account. This sum was clearly Trust property. This sum under the Trust should have been divided into three separate shares and the beneficiaries advised accordingly so they could each make demand for payment of their individual share. Snavely failed to do so, and proceeded to pay the funds as she saw fit, even to the point of belatedly attempting to place a substantial income tax consequence against Douglas Miller, Ex. 77, without any consultation with Douglas and even though he received no distribution of trust income. Snavely failed to provide annual reports or accountings. She commingled Trust income and expenses with her own personal account. When 1st Interstate Bank was trustee, Snavely herself set a trustee's standard for the bank which included preparation of a written business plan or Ranch Master Plan in order to realize maximum returns to the trust from sales. Snavely further demanded

the Bank should have marketed the property by listing the ranch with qualified realtors to optimize exposure and sale of the ranch in accordance with a master plan. Ex. 681. Snavely violated the very standard which she set for the former trustee.

Finally, as I read the trust instrument, it was the intention of Margueritte to provide her children with a 1/3 interest each in the trust property, and the trust granted the trustee a 5 year window from her death to sell the property. Even before Margueritte's death, Snavely was appointed as a professional person to sell the property in Margueritte's chapter 11 case. I noted in the order of April 10, 1997 (Ex. 24): "[I]t is now obvious that the post-confirmation activities of Debtor and Bonnie Snavely have not at all followed the terms and provisions of the confirmed Plan of Reorganization . . . . the real property was not liquidated as agreed." Snavely's present proposal ignores that provision and unilaterally substitutes the litigation proceeds for payment of claims, absent sale of the real property, to the exclusion, however, of Farm Credit." [sic] In trial of this cause Snavely related a litany of contacts she claimed she performed to accomplish a sale. In the end, the only sale she did consummate was a sale to herself, which was rescinded.

At a hearing on May 30, 2001, before this Court on Snavely's Motion for Reconsideration of this Court's order determining the applicability of the automatic stay under 11 U.S.C. § 362 to the Washington state probate proceedings, this Court wrote in its Order of June 7, 2001: "Snavely testified that she is prepared to purchase the Kona Ranch for $2 million, which she can assemble and pay within 30 days of approval."

The Court then lifted the stay to allow Snavely to purchase the Kona Ranch property for her offer of $2 million, provided that she turn over to the DIP the sum of $666,666.67 representing DIP's 1/3 share of the trust property, to be deposited

in the DIP's trust account where DIP cannot spend or otherwise dispose of it until Snavely's claims against the estate property are submitted and their allowance is finally determined in proceedings in this Court. The Court granted Snavely 35 days to turn over the DIP's share of the sales proceeds.

Snavely never revealed that the sale of the Trust property (Ex. 70-2) was also coupled with a sale of her individual property, requiring a loan of $2,500,000 from developers Potter/Clinton. (Ex. 70-1; 70-4). Potter/Clinton were to obtain the financing of the sale, not Snavely. (Ex, 70-6; 70-13). Potter/Clinton wanted Snavely to contribute 174 adjacent acres to the development plan. (Ex. 70-6). Snavely wrote the president of Big Sky Western Bank on May 26, 2001, 4 days before the May 30 hearing, that Potter/Clinton have entered into an agreement with Snavely to acquire the interest in the Kona Ranch, "which includes that of the Margueritte L. Miller Living Trust and those I hold personally." Ex. 70-9. By July 6, 2001, financing was not obtained and Potter/Clinton sought an extension of time to purchase the Kona ranch property. Ex. 70-10. In response, Snavely's attorney wrote on July 24, 2001, that in light of the difficulty in securing financing "we would like abandon (sic) the earlier agree-ments and pursue negotiations with you toward a new structure for closing the sale." Snavely proposed to sell the trust property to Potter/Clinton for $2 million dollars and be willing to sell her adjacent property, with the exclusion of the ranch house, for a price of $1,767,000. The letter enclosed a termination agreement rescinding the sale. Ex. 70-11, which was executed on July 30, 2001 (Ex. 70-12). Snavely never brought these developments to the attention of this Court or to Miller. Her self-dealing of her personal interests with that of the Trust is apparent.

Whatever the reasons[6], the sale, like all of the prospects, failed, even though Snavely firmly informed this Court the funds from her purchase would be forthcoming within 30 days. The total failure of Snavely as trustee to accomplish a sale of the trust property with ample time to do so all the while running up extraordinary expenses such as remodeling ranch buildings, leads to only one conclusion. Snavely failed miserably in her duties as trustee to the detriment of the beneficiary, Douglas Miller. It is also clear that Snavely dealt her personal interests along with the trust to the complete exclusion of Douglas's property interests and without his knowledge. Under these circumstances, a substantial trustee's fee sought by Snavely is not warranted.

The Proof of Claim includes "Legal fees paid on Bankruptcy of Margueritte Miller in the amount of $135,201.02. (See Ex. 524, p. 11). This request is in fact a demand for attorney's fees incurred in Snavely's chapter 11 bankruptcy as the Margueritte Miller chapter 11 fees to the Patten firm were paid from the proceeds of the lawsuit. Ex. 24. Counsel Kornfeld, attorney in the chapter 11 Snavely bankruptcy, through Ex. 616, "estimated" the fees attributable to Miller's claim at 60% of the total fee. Ex. 616 shows billing records of $179,756.81, with a payment of $156,361.79 and a credit write-off of $23,395.02. In Snavely's post-trial brief (p. 45) counsel states: "Analysis of the billing record which is attached hereto indicates that the precise amount should be $143,800.44 as compared to $135,201 stated in the accounting which was based on a ratio of the relative asset value of the Trust as compared to the individual assets of Bonnie Snavely." It is difficult to accept this statement as the record

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[6] Snavely contends that Miller's litigation interfered with the completion of the sale. I find this argument difficult to accept since at this time Snavely had 2 court orders approving the sale, the latter order coming from this Court and to which Miller filed no objection.

shows the Trust assets were valued at $[ILLEGIBLE] million while Snavely valued her individual assets at $1,767,000.

The attachment to the brief was not presented during the testimony of Kornfeld and is simply argument of counsel. The attachment totals $91,877.00 and how that factors into $143,800.44 is unexplained. In any event, the argument and attachment to the brief are not admissible in evidence and therefore not relevant. *Hurley v. Student Loan Acquisition Auth. of Ariz., et al.*, (*In re Hurley*), 258 B.R. 15, 23 (Bankr. Mont. 2001) (An attorney's argument is not evidence); *United States v. Velarde-Gomez*, 224 F.3d 1062, 1073 (9th Cir. 2000); *Exeter Bancorporation v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1312 n.5 (Statements of counsel are not evidence and do not create issues of fact), citing *United States v. Fetlow*, 21 F.3d 243, 248 (8th Cir. 1994), *cert. denied*, 513 U.S. 977, 115 S.Ct. 456, 130 L.Ed.d 365 (1994); *In re Nielsen*, 211 B.R. 19, 22 n.3 (8th Cir. BAP 1997) (Neither statements of counsel nor exhibits to a brief are evidence unless expressly stipulated as admissible evidence); *Haymaker v. Green Tree Consumer Discount Co.*, 166 B.R. 601, 607 (Bankr. W.D. Pa. 1994) (Documents attached to debtors' motion do not constitute evidence and may not be considered by the court).

Had Snavely's witness Kornfeld desired to present exact data concerning his billing record in the form attached to Snavely's brief, it could have been marked as an exhibit and testimony on direct and cross examination would test its authenticity. The present record only contains an estimate and no analysis.

Moreover, Kornfeld Ex. 617 was offered into evidence. The witness testified that the application for fees was approved by the bankruptcy court, that he would try to allocated [sic] the trust portion, but could not do so without an analysis. Kornfeld's application was filed after Snavely's plan was continued, and after the Miller claims were resolved by sum-

mary judgment, and detailed the numerous services performed for the benefit of the debtor's estate. The pertinent portion of the application as to the issue under consideration is paragraph 12, p. 7 of Ex. 617, which reads:

> "12. The services provided and costs incurred on Exhibit 'A' (Billing record) were performed on behalf of Debtor and *not on behalf of a creditor or other entity herein*." (Emphasis added).

Snavely is judicially estopped from taking an inconsistent position in this Court from the position her chapter 11 counsel took in the Bankruptcy Court of the Western District of Washington. *Hamilton v. State Farm Ins. and Casualty Co., supra*. The "Disclosure of Compensation of Attorney for Debtor" in Snavely's chapter 11 case states: "The source of compensation to be paid to me is: Debtor." Attorney Aimee S. Willig for Bush, Strout & Kornfeld certified the declaration was a "complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in the bankruptcy proceeding." Ex. 69-19.

Miller was not a co-debtor in the Snavely bankruptcy. Ex. 69-19. Schedule 'H'. The Trust was not listed as a co-debtor, Kornfeld's firm did not represent the Trust and Snavely's plan and disclosure statement never sought any monetary relief for chapter 11 attorney's fees against Miller. Ex. 635. Had Snavely desired to seek an award of Kornfeld's fees from Miller, the proper court to pursue such action would have been the Western District of Washington Bankruptcy Court.

There simply is no contractual basis, express or implied, to hold Miller responsible for Snavely's chapter 11 bankruptcy attorney's fees any more than there would be to hold Miller responsible for Snavely's unsecured claims. The legal basis asserted by Snavely for holding Miller liable for her chapter 11 bankruptcy fees is that the filing of her chapter 11 case

stopped the foreclosure on the trust property by secured creditor Farm Credit Bank of Spokane. That claim had been resolved in the Margueritte Miller chapter 11 case, only to have Snavely let it go into default. Moreover, Snavely's disclosure statement also reveals the chapter 11 case was filed to protect her personally owned property from nonjudicial foreclosures being conducted by Creative Finance, Alma Myers and Phyllis Gingerich, affecting Tracts KK, HH and EE. Ex. 635, p. 5. It was also stated the debtor's secured debt was approximately $445,000, of which "Debtor's two brothers are jointly and severally liable on the Farm Credit Tract A loan in the approximate amount of $143,000.00." Thus, the majority of the secured debt was against Snavely personally, not Tract 'A'. And furthermore, there is no basis under the trust instrument to legally bind Miller for Snavely's personal debt, which includes Kornfeld's fees. Thus, for the above reasons, this portion of the Snavely Proof of Claim is rejected and denied.

Ex. 524. Note 'D' claims debts of the decedent as part of the accounting. I have already decided the matters dealing with the personal representative fee, the Snavely $200,000 loan, the Mattie Dixon $10,750 gift and the Phillip Miller $3,698.00 debt never paid by Snavely despite a court order to do so.

As to the other matters, I reject the following:

1. Probate attorney fees of $45,571.70. Attorney fees of $34,873.48 were requested in the Margueritte Miller chapter 11 case to be paid from the lawsuit settlement. The court rejected such payment as a post-petition debt. Nevertheless, Snavely proceeded to pay some fees. Ex. 525, p. 12. I reject the probate fees for the same reason I rejected the personal representative fee[7]. The payment made is sufficient compen-

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[7] I note the probate counsel Davis, Wright Tremain have filed an Application for Professional Fees and Costs totaling $179,351.50 for

sation for the probate legal services, considering also that Snavely was personally represented by chapter 11 counsel throughout most of the period, thus providing duplicate services.

2. I further reject the balance of accountant fees of $6,926.00 since the compensation of $6,000 already paid is reasonable. If further fees were due in the Margueritte Miller chapter 11 case, an application should have been made in that proceeding when the Patten law firm was paid. I find no basis has been submitted in evidence to support the additional fees of $6,926.00.

3. I reject payment made on the new irrigation system in the sum of $15,000 as this was for Snavely personally after settlement of the matter in the Miller v. Miller adversary. Ex. 3.

4. I reject the separate item for PCI Survey of $10,795.21 as this amount was paid from the Mountain Bank loan, and so it is another duplication in the compilation.

5. The ranch insurance premiums of $20,631.92 should be adjusted to $11,524.23 as some of the beneficiary's personal property was covered in the insurance premiums. Ex. 47. Further, I reject the remainder of the ranch insurance expense as paid by ranch income.

I accept the following costs of trust administration dealing with the Trust property:

1. Grass Valley Frenchtown District—$1,590.00. The sum of $5,300.00 paid was from the bank settlement proceeds. This sum is a cost of maintenance of Tract A.

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attorney's fees and $36,174.89 for costs for a total of $215,526.39. The application states the firm was paid for its services through September 30, 1996. This application is the basis of one of the duplicate proofs of claim.

2. Stevens & Company—$3,500. This is an appropriate fee for an appraisal.

3. Plat Development—$25,072.48. This expense was incurred for Kona East and performed for the potential benefit of Margueritte. Ex. 684-688.

4. Zier & Orser appraisal Fee—$1,458.89. This was title work for the benefit of the Trust estate in dealing with the mineral rights of Margueritte.

In Note E. of Ex. 524, Amounts Owed Trustee, the list includes one objectionable item, namely telephone charges of $10,344.16. This figure was derived by taking 25% of the phone bill as an estimate of calls dealing with the Trust. No actual phone records were kept for the Trust. This item is pure speculation and does not satisfy the burden of proof when accurate phone records could and should easily have been kept by the trustee.

The other three items, postage & mailing ($1,210.82), travel ($26,728.20) and cash expenses ($5,879.00) are accepted as based on actual items of trust expenses.

Payment to Loken for the ranch property improvements (Ex. 525, p. 13) of $44,250.80 are rejected due to the fact that some of the repairs charged to the Trust were made to Snavely's personal property as testified by Loken, and under the partition decree Snavely must undertake and defend this Loken lien foreclosure action inasmuch as she is receiving the benefit of the construction work ordered solely by her. That sum is not a proper charge against Miller.

The last item from Ex. 524 is "Loans from Trustee net of repayments" in the amount of $174,735.78. This item is evidently derived from Ex. 525, pp. 19-21. According to Ex. 525 "Transfers from Bonnie/Loans" total $266,518.68 for the period 8/25/95 to 8/26/00. The exhibit then reflects "Transfer to Bonnie" from 8/25/95 to 8/26/00 of $119,765.40. If in fact

these loans and repayments are accurate, the net figure should be $146,753.28, not $174,735.78 as reflected in the computation. This attempt to include the net loans as trust expenses is simply wrong. A critical examination of Ex. 525 and 524 shows ranch income receipts of $107,190.56. Ranch expenses are listed as $172.938.09 but that figure includes Loken lien payments of $44.250.80 (capital improvements) for which the Trust is not responsible. Also, the expenses include ranch insurance of $20,631.92, which concededly is $11,524.23, and thereby further reducing the expense by $9,107.69. Thus, the net total ranch expenses are $119,579.60. The amount of expenses over income is $12,389.04. The guest house rental totals $31,660.00. What then were these loan proceeds used for? Obviously, the proceeds could not have been used to fund ranch expenses. Ex. 525 gives a partial answer and clue. Page 12 shows payments of professional fees of $66,962.15 and p. 13 shows capital improvement payments to Loken of $44,250.80. Obviously, other professional fees, such as to Kornfeld, were paid from these loans. This Court has rejected all of those portions of the Proof of Claim. By like analysis, the "Loans from Trustee net of repayments" of $174,735.78 is therefore rejected. Snavely simply has not sustained her burden of proof to show the loan sum was used for proper trust expenses.

Moreover, Snavely Ex. 620 impeaches Ex. 525. Ex. 620 is a series of 42 promissory notes (most of which appear to have been prepared at one time) from Snavely to Snavely, totaling $335,536.00. All but 2 of the notes are entries made on pp. 19-20 of Ex. 525. Two notes, SN 4045 for $86,065.00 and SN 4052 for $954.14 are not entered in Ex. 525. Note 4045 is dated 2/14/97. The only entry in Ex. 525 for that date is "Xfer From M. Dixon First . . ." in the amount of $13,000.00. No explanation was given in the testimony of Snavely or McGuire as to the alleged loans of $86,065.00 and $954.14. Comparing the two exhibits proves the inaccuracy of the

accounting and an obvious preparation of exhibits after the fact, and not contemporaneous with the transactions.

I further give weight and credibility to the testimony of James Galipeau, a CPA hired by Miller to examine the accounts and records obtained from McGuire. Galipeau photocopied all records in the possession of McGuire, including the Quickbook disc with balance sheet. The disc included a number of different bank accounts including Snavely's personal accounts, but contained no comments regarding loans. Galipeau examined Ex. 524 and rendered an opinion that it was not accurate, after examining each detail of the compilation. Galipeau notes, for example, Ex. 524 includes guest house rent paid to trust of $31,660, but those receipts were never reported by Snavely in her personal income tax returns. Therefore, he concluded that since the guest house property was never transferred to Snavely, and she never reported the rents as income, the $31,660 were in fact trust assets to be applied against the ranch expenses and not a loan from Snavely.

As another example of accounting misfit, Galipeau stated that Schedule 1-E of Ex. 524 shows Tract EE interest payable by the Trust of $22,525.23, but in Snavely's 1998 tax return she takes an interest deduction for the Gingerich loan of $11,293, meaning Snavely was the payor, not the Trust. Equally important, Galipeau stated from the exhibits the 5 year history of the ranch shows $172,938 in expenses against $107,191 in income, leaving a net loss of $69,578. However, Snavley's CPA includes over $68,000 of capital expenditures as expense so the net loss is near zero, particularly considering the guest house rent was Trust income, but not included as such.

There is another puzzling feature of Ex. 525. Page 19 shows a deposit on 2/11/97 as "Loan from Bonnie" in the sum of $72,500 deposited in Key Bank. Snavely testified it was a loan to the Trust. The second portion of Ex. 525 shows

on page 10, under Key Bank account (Snavely's personal account) on 2/11/97 a deposit denoted "—SPLIT—" of $73,065.00. The curious feature of these two deposits is that the deposit date corresponds precisely with Snavely's "Proposed Distribution of Settlement Proceeds" filed in Margueritte's chapter 11 case on March 31, 1997, which recites in part on Schedule 'A' 4.

"Reimburse for creditors paid in February*

Total ($156,350.49)

* Bonnie Snavely borrowed funds to pay these creditors in February" Ex. 24.

At the hearing on the proposed distribution Snavely produced as an exhibit checks totaling $156,350.49, all dated February 11, 1997. This Court's order of April 10, 1997, (Ex. 24) details the application reciting the reimbursement request. The April 10 order allowed reimbursement to Snavely of $144,002.48. Each check is written on Key Bank account no. 4702203225, which is the same account listed in Ex. 525, pp. 19 and 6, to which was deposited the $73,065 and $72,500. I conclude that the $72,500 included in Ex. 525 and claimed as a loan from Bonnie was in fact paid out of the proceeds of the lawsuit settlement under the Order of April 10. Including that sum in the $266,518.66 is thus improper since Snavely had been paid on that loan. Why the loan was "split" is not explained in the record. What is noteworthy is that Ex. 525 fails to report as a transfer to Bonnie the sum of $144,002.48. The closest transfer in time to Bonnie is one entered 4/24/97 (Ex. 525, p. 21), stating "wired into Bonnie's Me . . . La . . . $66,535.37." This deposit date is close to a deposit of 4/17/97 of $399,411.81 into the Merrill Lynch account (Ex. 525, p. 4) denoted "1st Interstate Lawsuit proceeds . . .". Of course, if the $66,535.37 came from the $144.002.48, there is still no explanation where the balance of those funds were deposited. From all of the foregoing, I conclude the $72,500 claimed as a loan was in fact paid from the lawsuit proceeds as directed

in Ex. 24, and should therefore be deducted from the $146,753.28 to reflect a net balance of $74,253.28. This figure is rejected for all of the reasons cited above.

I can only conclude the accountings and compilations are a financial mess, full of inaccuracies and duplication and not supported by independent invoices, but put together only on the basis of Snavely's word. Indeed, if one were to accept Snavely's position as to Trust income, one would have to accept that the following list of loans in fact accrued for the benefit of and were spent for the Trust, to-wit:

Myers note— $50,000

Sousa note— $50,000

Gingerich note— $95,000

Mountain Bank note— $220,000

Phantom loan— $200,000

Dixon loans— $140,000

Miller bankruptcy loan— $156,350

Loans for Bonnie— $266,578 or $335,536

Guest house rent— $31,660

Mineral lease— $11,888

Total— $1,221,616.00 or $1,290,634.00

And then one would have to also add as Trust money handled by Snavely the net lawsuit proceeds of $537,507.00, bringing the grand total to either $1,759,123 or $1,828,441. All of this extraordinary amount for the administration of one asset of real property! Of course, Snavely employed 5 different and expensive law firms, 2 CPA's and a plan trustee to assist her administration of that single asset. Put in this perspective, I can hardly conclude that the Trust fiduciary ably and conscientiously performed her legal duties for her beneficiaries as required by law. For this reason, the Court could

easily reject Snavely's Proof of Claim *in toto*. The claim could also be rejected in its entirely under Rule 3007-1, Local Bankruptcy Rules, United States Bankruptcy Court for the District of Montana (Mont. LBR). Rule 3007-1 provides:

> Overstated Proofs of Claim.
>
> A proof of claim found to be knowingly overstated or false as to any material item may be disallowed in its entirety by the Court, after hearing.

Snavely's claim for the $200,000 phantom loan, which she concedes is overstated, together with interest on that claim, her claim for debts of Margueritte to Dixon and Phillip Miller, which she knew were never paid, her claim for her chapter 11 attorney's fees under circumstances where she alone would be responsible for payment, and her claims for loans from Dixon and lawsuit proceeds are all evidence of knowingly overstating a claim.

CONCLUSIONS ON PROOF OF CLAIM

In the interests of justice, however, I must conclude that Douglas Miller should bear some financial responsibility for the care of his mother and other trust expenses. I decline to use Ex. 656 as it includes items outside the trust period and is clearly erroneous. Therefore, I utilize Ex. 524, 525, 669 and 670 to compute trust expenses within the appropriate period. I therefore allow Snavely's Proof of Claim as follows:

1. Medical, nursing and daily care for Margueritte:		
Ex. 669 & 670:	$214,589.94	
Less: Gingerich	($49,171.01)	
and Sousa principal	($45,080.32)	
To be included below	(94,251.33)	
Less: Sums paid by outside sources:		
Mattie Dixon	(136,728)	
Mineral lease	(11,888.55)	
Net:		($28,277.94)

2. Mountain Bank/Gingerich Principal and interest (Ex. 525)	$95,421.62
3. Gingerich interest Net from Trust (Ex. 525)	11,232.73
4. Creative Finance/Sousa Principal and interest (Ex. 22)	65,265.67
5. Mountain Bank interest to petition date—Proof of Claim	14,209.59
6. Mountain Bank/PCI and other disbursements (Ex. 525)	14,415.33
7. Grass Valley (Ex. 524)	1,590.00
8. Postage and mailing (Ex. 524)	1,210.82
9. Cash expenses (Ex. 524)	5.879.00
10. Travel (Ex. 524)	26,728.20
11. Trustee fee[8]	7,900.00
12. Funeral expenses (Ex. 524)	2,225.00
13. Stevens & Co. (Ex. 524)	3,500.00
14. Plat development (Ex. 524)	25,072.48
15. Zier fee (Ex. 524)1,458.89	
16. Ranch expenses in excess of ranch income 8/25/95 to 8/26/00— less adjustment for Loken lien ($44,250.50) and insurance ($9,107.69) (Ex. 524) Net:	12,389.04
TOTAL Allowable Trust Expense	$260,220.34

Since Miller was the beneficiary of a 1/3 interest in the Trust property, his proportionate share of the expenses is

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[8] Reasonable attorney's fees of $28,069.70 were paid from the proceeds of the lawsuit.

$86,740.11. This sum is the amount allowable on Snavely's Proof of Claim No. 8.

MILLER'S COUNTERCLAIM

Miller filed a federal district court complaint (CV-147-M-DWM), which action was transferred to this Court on March 30, 2001. The Court treats that complaint as a counterclaim against Snavely's Proof of Claim. The Pre-Trial Order recites that Miller's asserts claims for breach of fiduciary duty, removal of the trustee, breach of common law good faith and fair dealing, tortious interference with business relation, punitive damages based upon malice and fraud, partition of the Trust property, breach of contract, injunctive relief and attorney's fees. Also to be considered as a counterclaim are the costs and attorneys' fees, if allowable, awarded to Miller by the federal district court on the Rule 70 motion and order. The claim dealing with removal of the trustee is moot as the Trust has expired. Other claims have been decided by this Court in the partition decree and easement order. The balance of the tort claims are considered here. At the conclusion of Miller's case on the counterclaim for damages, Snavely's counsel made a Rule 7052 motion, which was taken under advisement. This Court will dispose of that motion in this Order.

I conclude from Miller's evidence that one damage claim has been proven by a preponderance of the evidence, and the claim for injunction must also be decided.

Miller's claims for relief include the tort of intentional infliction of emotional distress through tortious interference with business relations. The Montana Supreme Court recognized the tort of intentional infliction of emotional distress as an independent cause of action under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 220, 238, 896 P.2d

411, 417, 429 (1995); *May v. Era Landmark Real Estate of Bozeman*, 302 Mont. 326, 341, 15 P.3d 1179, 1187 (2000). In *Sacco* the Supreme Court summarized:

> An independent cause of action for infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. The difference between the negligent and intentional versions of the cause of action lies, not in the elements of the tort, but in the nature and culpability of the defendant's conduct. That being the case, when a cause of action for intentional infliction of emotional distress is pled, the plaintiff may request relief in the form of punitive damages, per § 27-1-220, MCA, to address the culpability of the defendant's conduct. Serious or severe emotional distress to the plaintiff which was the reasonably foreseeable consequence of defendant's negligent or intentional act or omission will be addressed in both causes of action.
>
> as [sic] stated above, through a prayer for relief in the form of compensatory damages. Serious or severe emotional distress is defined according to the Restatement (Second) of Torts, § 46, comment j at 77-78. Finally, it is for the court to determine whether on the evidence severe or serious emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Sacco, 271 Mont. at 238-39, 896 P.2d at 429.

In the instant bench trial, the Court acts as finder of fact.

The Supreme Court explained serious or severe emotional distress as:

> [I]t is appropriate to define "serious" or "severe" emotional distress by employing the Restatement (Second)

of Torts definition of severe or serious emotional distress. (We note that, although the Restatement definition addressed the definition of serious emotional distress in the context of the tort of intentional infliction of emotional distress, we conclude that it is also appropriate to use that same definition in connection with negligent infliction of emotional distress.) The Restatement (Second) of Torts, § 46, comment j at 77-78 defines "serious" emotional distress as:

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved . . . .
>
> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge.

Sacco, 271 Mont. at 233-34, 896 P.2d at 426.

A later case expanded on *Sacco*:

> Measuring this element requires a careful consideration of the circumstances under which the infliction occurs,

and the party relationships involved, in order to determine when and where a reasonable person should or should not have to endure certain kinds of emotional distress.

Thus, the very same descriptive terms that have been used to characterize compensable emotional distress in some circumstances have also described emotional distress that has been denied recovery. *Compare Zugg v. Ramage* (1989), 239 Mont. 292, 298, 779 P.2d 913, 917 (affirming emotional distress damages for "chest pains," worries over financial stability, and "sleepless nights" resulting from tortious misrepresentation in sale of resort) and *Niles v. Big Sky Eyewear* (1989), 236 Mont. 455, 465, 771 P.2d 114, 119-20 (concluding that such evidence as a personality change and marital problems was sufficient to raise jury issue on negligent infliction of emotional distress) *with Lence v. Hagadone Inv. Co.* (1993), 258 Mont. 433, 444-45, 853 P.2d 1230, 1237 (concluding that evidence of one visit to a hospital emergency room "for stress and heart-related problems and circulatory problems" insufficient for recovery) and *McGregor v. Mommer* (1986), 220 Mont. 98, 111-12, 714 P.2d 536, 545 (concluding that financial problems resulting from tortious conduct, which "bothered" plaintiff "a lot" and "at times, it would show up at home," were not sufficiently serious to warrant jury instruction for emotional distress damages). *See also First Bank*, 236 Mont. at 206, 771 P.2d at 91 (disapproving of recovery for loss of sleep and nervous tension).

Maloney v. Home and Investment Center, Inc., 298 Mont. 213, 230-31, 994 P.2d 1124, 1135-36 (2000). The Court in *Maloney* also noted:

> [I]t is well settled in our case law, in point of fact, that emotional distress damages may result from negligent or intentional damage to property arising from interference

with the use and enjoyment of land. *See French v. Ralph E. Moore, Inc.* (1983), 203 Mont. 327, 661 P.2d 844 (affirming award of $190,000 total damages to plaintiffs for "pain, discomfort, fears, anxiety, annoyance, inconvenience and other mental, physical and emotional distress suffered by plaintiffs as a result of the invading gasoline vapors" produced by negligent contamination of plaintiff's business and home). Similarly, in *Johnson v. Murray* (1982), 201 Mont. 495, 656 P.2d 170, although emotional distress was not specifically identified, we nevertheless affirmed an award of $100,000 in compensatory damages that included compensation for the "humiliation, embarrassment, distress, and ridicule" associated with the wrongful imposition of a lien on the plaintiff's real property that reduced its market value and "interfered with their use of their private property." *Johnson*, 201 Mont. at 507-508, 656 P.2d at 176-77. *See also Town of Stonington v. Galilean Gospel Temple* (Me. 1999), 722 A.2d 1269, 1272 (holding that evidence of headaches and depression by property owners proved that noise from quarry operations caused them serious emotional distress); *Edwards v. Talent Irrigation Dist.* (1977), 280 Or. 307, 570 P.2d 1169, 1170 (holding that "mental anguish" damages were recoverable following irrigation district's flooding of respondent's land); *Daluiso v. Boone* (1969), 71 Cal.2d 484, 78 Cal.Rptr. 707, 455 P.2d 811 (holding that removing of boundary fence over protests of elderly plaintiff resulted in infliction of mental distress).

We conclude that the property interest here sufficiently involves the use and enjoyment of land to fall within the foregoing category of holdings. Here, the Maloneys testified they were "devastated" by the sudden impact of Fishel's possible sale to someone else. They suffered intense emotional hardship during the ensuing weeks when they attempted to undue [sic], unsuccessfully, the im-

> pending sale. Additionally, their testimony as to emotional distress was not substantially contested by Lee at trial. *See Rocky Mountain Enterprises, Inc. v. Pierce Flooring* (1997), 286 Mont. 282, 298, 951 P.2d 1326, 1336 (concluding evidence of party's domestic disputes was relevant because it showed that the claimed emotional distress may have been caused by other factors, and affirming denial of damages).

Maloney v. Home and Investment Center, Inc., 298 Mont. at 232-33, 994 P.2d at 1137. In *Maloney* the Court agreed "that no reasonable person should have to endure such emotional distress, especially in light of the inherent duration of their adjacent land ownership." 298 Mont. at 234, 994 P.2d at 1137.

The above excerpt from *Maloney* could be applied to the distress suffered by Miller in several specific instances. First, Snavely, who personally owned land adjacent to Milier (Tract EE), and mortgaged that property to Phyllis Gingerich, individually and as trustee, the trust indenture (Ex. 565) and agreement (Ex. 564) granted Gingerich a 60' wide private road easement from the Kona Ranch Road to the boundary of Tract EE "lying along the existing ranch complex access road running through COS 2520 and 2355A or other access acceptable to the Beneficiary (Gingerich)." The easement was across Miller's land and the Trust property, and without his permission or knowledge. The Court in *Maloney* wrote: "That compensable emotional distress would arise from the tortieus interference with the Maloneys' rights to the property in question should have been clearly foreseeable by any person professionally involved with such transactions." 298 Mont. at 234, 994 P.2d at 1137.

Snavely's entire reasoning for her self denting and failure to promptly administer Trust assets within the term of the Trust was her desire to professionally develop the property. Her granting of an easement across Miller's land with no

justification, excuse, or consent, tortiously interfered with Miller's rights to his own property, and gives support to his claim for damages.

In addressing damages for the tort of intentional infliction of emotional distress, the Supreme Court explained in *Sacco*:

> [D]amages for emotional distress are compensatory and, therefore, the focus should be on the reasonable foreseeability that plaintiff's serious or severe emotional distress was the consequence of the defendant's act or omission.
>
> The defendant's culpability for intentionally inflicting emotional distress is "more properly considered when addressing the subject of punitive damages." (*Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 472-73, 686 P.2d at 213 (1984)]. *See also; Miller v. Watkins* (1982), 200 Mont. 455, 468, 653 P.2d 126, 132. ("Punitive or exemplary damages are allowed where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, for the sake of example and by way of punishing the defendant. Exemplary damages shall be used when the defendant clearly shows that he is deserving of such special treatment and punishment.") (Citation omitted.) We conclude that an award of punitive damages is the proper method of addressing the culpability and intentional nature of the defendant's conduct in an intentional infliction of emotional distress case.

Sacco, 271 Mont. at 238, 896 P.2d at 428.

After the Plaintiff's case in chief the Trust's attorney Patten moved to dismiss Miller's claim for intentional infliction of emotional distress on the grounds that Miller failed to provide any evidence of damages. "[I]t is for the trial court to determine whether the evidence supports a finding of severe emotional distress. *Sacco v. High Country Independent Press* (1995), 271 Mont. 209, 239, 896 P.2d 411, 429." *St. John v. Missoula Elec. Co-op., Inc.*, 282 Mont. 315, 321, 938 P.2d

586, 589 (1997). It is necessary for the plaintiff to prove that the emotional distress suffered is severe or serious. *Sacco*, 217 Mont. at 232, 237, 896 P.2d at 425, 428. Concern that a party might be subjected to unlimited liability is alleviated by the necessity of demonstrating that plaintiff's serious or severe emotional distress was the reasonably foreseeable consequence of defendant's intentional act or omission. *Sacco*, 217 Mont. at 237, 896 P.2d at 428; *Nelson v. Hawkins*, 45 F.Supp.2d 1015, 1021 (D. Mont. 1999). However, there is no requirement that a plaintiff present expert or medical testimony of emotional distress. *May v. Era Landmark Real Estate of Bozeman*, 302 Mont. 326, 341, 15 P.3d 1179, 1187 (2000).

It is Miller's position, as supported by the evidence presented at trial, that Snavely desired and needed to have his Parcels CC and DD, including DD-1 and DD-2, as a part of her planned development of the ranch property. Snavely, on a number of occasions, including her dealings with PC Development of Bozeman, indicated the ability to have CC and DD as a part of Snavely's purchase arrangement on the property. Ex. 70-6.

Snavely placed a gate over the entrance to Amigo Drive, the only access to Miller's parcels and placed a lock and chain on the gate, sometime around 1997. Ocken Dep. Ex. 13; Ex. 57. Further, Snavely contended that she had not [sic] obligations under the 1980 Family Agreement, Ex. 2, concerning the furnishing of easements and utilities to Miller's CC and DD properties. She claimed the Family Agreement expired by its own terms. This Court has concluded otherwise. Miller placed great belief in the family agreement.

Miller had an established relationship with the Jarretts, whose name was supposedly kept confidential. On 11/19/99 Jarretts signed a buy-sell agreement for $695,000 through realtor Jeri Fisher to purchase Miller's Tracts CC and DD. To thwart that sale, Snavely at that same time presented to Miller

an offer to buy the same Tracts CC and DD plus all of Miller's beneficial interest in the Trust property. Miller testified he was bound by the Jarrett deal. Jarrett's deposition testimony, Ex. 83, supports the conclusion that the transaction fell through because of the failure to Miller to be able to provide suitable access to the property for ingress and egress and for utilities. The access was restricted by Snavely placing a lock and chain on the gate, Jarrett testified: "And you know, because I'm sitting here under oath, and I have to answer the question, yeah, but the time it was all done and we pulled out and said no thanks, the whole situation gave us the creeps." Expanding on "creeps" Jarrett said: "Some of it, and again, the difficulty in getting access to the property, the history behind, you know, why there was an argument about access to in the first place. Just again, the experience we had when we were—one of the experiences we had going out there and feeling like being watched."

I find all of Snavely's conduct to thwart the Jarrett sale was wrongful. Snavely contends she locked the gates to protect her property from vandals. There is no credible evidence presented by Snavely to support this excuse.

Indeed, the easement issue had been settled by this Court on January 19, 1996, directing her to grant and mark out an easement on Amigo Drive to access section 17, owned by Miller, which gives access to Tracts CC and DD. Not only did Snavely not perform pursuant to that Order, but she took steps to restrict access by failing to survey for the easement and locking and chaining the gate. The record shows the access over Amigo Drive had been traditionally unrestricted to Miller's property until 1997. Such actions by Snavely wrongfully interfered with Miller's legal right to access as found by this Court.

I conclude Snavely's actions were spiteful and intended to disrupt, and did disrupt Miller's effort to market his property. Her actions effectively foreclosed free and clear access to

which Miller or his successor's were entitled and caused a loss of the Jarrett sale.

Bonnie Snavely's intent was to cause a failure of the Miller/Jarrett buy-sell agreement, in which she was successful, by refusing to provide utility easements to the property when she knew that utility easements were required to be provided pursuant to the terms and conditions of the Family Agreement. Bonnie Snavely thus intentionally interfered with the business relationship of Miller with the Jarretts and caused the sale to the Jarretts to fail. Further, Snavely effectively precluded a sale of Miller's property for a reasonable market price by restricti g access and denying utility access.

The Court heard Miller testify about his reactions to Snavely's machinations, which deprived his [sic] of his life's dream: To acquire a large-scale operation in a rare instance of market conditions and low cattle prices. Miller's life's ambition was denied by Snavely's actions, impacting not only him but also his daughter, for whom Miller wished to exploit his market opportunity. The opportunity developed, and was lost by Snavely's tortious interference with the Jarrett buy-sell agreement. Snavely thus intentionally placed Miller's interests in jeopardy. His testimony of uncertainty, frustration and anguish is not only credible, but predictable and it is reasonable and justified under the circumstances, and therefore compensable. Moreover, Snavely is Miller's sister as well as trustee of the Trust, and she allowed her personal antipathy to Miller, and used her fiduciary position as trustee, to interfere with Miller's legitimate rights.

Emotional distress is serious or severe only if the "distress inflicted is so severe that no reasonable [person] could be expected to endure it." *Sacco*, 217 Mont. at 233-34, 896 P.2d at 426. In determining the severity of the distress the finder of fact should consider both the intensity and the duration of the distress. *Id.* Liability does not apply "where the plaintiff has suffered exaggerated and unreasonable emotional distress,

unless it results from a peculiar susceptibility to such distress of which the actor had knowledge." *Sacco*, 217 Mont. at 233-34, 896 P.2d at 426; *Ray v. Washington Nat. Ins. Co.*, 190 F.R.D. 658, 663 (D. Mont. 1999).

Snavely's failure of her duty as trustee of the Trust for the benefit of Miller reflects both intensity and the duration of the distress. From the beginning of the Trust's inception in 1993 Snavely failed her fiduciary duty to account to Miller for the Trust and Margueritte's estate. That failure continued until this litigation, where Snavely finally provided an accounting which, although prepared by a CPA, carried no reliability or guarantee for the figures she provided, and which the Court concludes is insufficient under the Trust based upon the findings heretofore made on the decision on Snavely's Proof of Claim. The rampant disregard of her trust responsibilities only exacerbated her personable dislike for Miller.

In *Maloney* the Court wrote:

> We have determined that "[e]ach case must, of necessity, depend on its own peculiar facts." *French*, 203 Mont. at 336, 661 P.2d at 849. We have further ruled that the amount of damages is not the amount which in our opinion would compensate the injured party; rather, "it is a question of what amount of damages will the record in the case support when viewed, as it must be, in the light most favorable to the plaintiff." *French*, 203 Mont. at 336, 661 P.2d at 849 (citation omitted).

Maloney, 298 Mont. at 234, 994 P.2d 1137-38.

The record in this case support a significant level of damages.

As to the suggestion that emotional damages awards must be supported by some kind of "objective" evidence, as argued by Snavely's counsel in presenting the Rule 7052 motion, the Ninth Circuit has written:

> While objective evidence requirements may exist in other circuits, such a requirement is not imposed by case

> law in either Washington, the Ninth Circuit, or the Supreme Court. *See* [*Herring v. Dept. of Social and Health Services*, 81 Wash.App. 1, 914 P.2d 67, 77-83 (Wash. Ct. App. 1996)] (upholding damage award in excess of $1,000,000, including $550,000 for emotional damages, in disability discrimination and retaliation case based on testimonial evidence of emotional harm); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir. 1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (noting that emotional distress damages are "essentially subjective" and may be proven by reference to injured party's conduct and observations by others). See also *Merriweather v. Family Dollar Stores*, 103 F.3d 576, 580 (7th Cir.1996) (noting that plaintiff's testimony can be enough to support emotional damages).

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 513 (9th Cir. 2000).

In *Johnson v. Hale*, a housing discrimination case out of Billings, Montana, the Ninth Circuit wrote:

> [C]ompensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms. Id. at 1193 (citing *Phiffer v. Proud Parrot Motor Hotel*, 648 F.2d 1353548 [sic], 552-53 (9th Cir. 1980); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir.1974)). We also emphasized that "both plaintiffs provided detailed and substantial testimony to support their claims that they suffered emotional distress as a

> result of the Hales' discriminatory acts" and that "[t]he Hales offered no evidence to rebut this testimony."

Johnson v. Hale, 13 F.3d 1352-53.

The Court heard Miller give detailed and substantial testimony regarding the emotional distress he suffered as a result of Snavely's self-dealing as Trustee, and Snavely offered no credible evidence to rebut his testimony. Miller's claim in support of emotional distress damages is proven by a preponderance of the evidence, as testified to by Miller and his brother Phillip. Miller testified he was and continues to be extremely disappointed and frustrated about his inability to transfer his Montana property interest into a ranching venture in Arizona. Had he been able to accomplish the Jarrett transaction and purchase the Arizona ranch, he would have significantly improved his financial condition as the Arizona properties are now worth substantially more at this time. Ex. 643 and 683 support this testimony. In November of 1999, Miller identified the specific properties that he could have purchased by the IRS section 1031 exchange and the amounts involved. The letter states he could have purchased the Monitor Ranch for the sum of $1.2 million together with 800 head of commercial cattle. At trial, Miller testified the estimated value of that property is now between $2.5 million to $3 million dollars. Miller's brother Phillip, observing his brother over the years, stated Douglas has been devastated by Snavely's conduct and has been unable to proceed with his life due to his inability to transfer any of his property interests.[9]

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[9] Indeed, it is truly ironic that any of this confrontation ever came to pass. For on November 24, 1994 (Ex. 3) Miller agreed to sell all of his property interests to Tracts CC, DD, 17 and the life estate for $5,000 to $15,000 per acre with a down payment due by September 1, 1998. Snavely was individually signatory to that agreement, but failed to take the opportunity to rid herself of her brother and all future litigation. She claimed she did not have the funds to make the purchase, but the evidence

I find Miller's demeanor on the witness stand compelling. He exhibited hurt and frustration to the point of tears. He harbors complete uncertainty as to life. Snavely's admissions to others corroborate Miller's testimony of emotional distress. Mytty testified that Snavely said Miller "belongs in Warm Springs[10]" and is "unstable", when she warned them to pay no attention to him.

For damages inflicted as a direct proximate cause of Snavely's interference with the Miller/Jarrett business relationship, and breach of her fiduciary trust. Miller presented the undisputed and credible testimony of Joseph D. Vinso, a financial resources management expert. Vinso presented 3 options of damages based on the assumptions that Miller would have been able to sell the designated Tracts CC and DD as of December of 1999, either for cash or on the basis of a section 1031 exchange. A section 1031 exchange provides that no gain or loss is recognized on the exchange of property held for productive use in a trade or business or for investment if the property is exchanged for property of like kind. Ex. 681.

As explained by Vinso, under Option 1 the purchase price of the Jarrett offer was $695,000. Based on that value, with a 10.5 percent capitalization rate ("cap rate"), Miller would have expected to earn $72,975 per year from this real estate investment. For a period from January of 2000 to September 1, 2001, or 21 months the loss to Miller was $127,706.00. I conclude this was direct monetary damages caused by Snavely's tortious interference with the Jarrett contract.

Miller is also entitled to general damages and punitive damages under Montana law. I conclude Miller is entitled to

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shows she never attempted to secure funding at a time she was making substantial loans and recovering large sums from Mattie Dixon.

[10] Warm Springs, Montana, is the historical site of the state-run institution for the mentally ill.

general damages for his emotional distress in the sum of $75,000. Miller's evidence shows Bonnie Snavely had a net worth of $3,685,521 as of January 31, 1999. Ex. 69-5. Based on that analysis by branch offices of Mountain Bank from information supplied by Snavely, I conclude an award of exemplary or punitive damages is warranted in the sum of $72,000, or 2% of her net worth.

Finally, counsel for Miller have presented in affidavit (Docket No. 67) true and correct copies of his billing hours and rate on the Rule 70 motion. Attorney fees are billed at $120.00 per hour and paralegal time at $60 per hour. The total hours sought is 35.2 hours for attorney's time and 8.2 hours for paralegal time, consisting solely of time expended to trial preparation and briefing on the Rule 70 motion. Total costs are $404, bringing a total request to $5,120.00.

The parameters to award costs and attorney's fees to a successful party under Rule 70 is set forth in *Columbia Gas Transmission v. Mangione Enterprises of Turf Valley, L.P.*, 964 F.Supp. 199 (D. Md. 1996). There the court held:

> The discretion of the District Court in fashioning relief for civil contempt includes the right to order payment of attorney's fees as an element of civil contempt damages. *See Folk v. Wallace Bus. Forms, Inc.*, 394 F.2d 240, 244 (4th Cir. 1968). Recovery of attorney's fees as an element of civil contempt damages does, however, require more than a finding of contemnor knowledge of its violation of the terms of the decree. A contemnor's refusal to comply with a Court Order must rise at least to the level of "obstinence or recalcitrance" before attorney's fees can be ordered. *Omega World Travel, Inc. v. Omega Travel, Inc.*, 710 F.Supp. 169 (E.D.Va.1989), *aff'd.*, 905 F.2d 1530 (4th Cir.1990). This requirement of obstinence or recalcitrance is based on the *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), decision in which

> the Supreme Court strongly reaffirmed the "American Rule" which disfavors awards of attorney's fees except in a limited number of exceptional circumstances, one of which is the "willful disobedience of a court order." *Id.* at 258, 95 S.Ct. at 1622.

Columbia Gas, 964 F.Supp. at 204.

Like the evidence in *Columbia Gas*, *supra*, which suggested that non-compliance resulted from more than just neglect or carelessness, the evidence here rises to the level of obstinence and recalcitrance. Snavely not only failed to delineate by survey the right-of-way and access over Amigo Drive, but she took the undisputed steps to restrict the access by lock and chain on the gate she placed across the right-of-way. Rather than seek clarification of this Court's Order as to time or any other matter, she took affirmative steps to restrict access. I would also note that under Montana law the general rule on easement interference is the owner of the reserved easement may use it to the full use of the right retained or decreed, in any lawful manner, including, in the absence of an express restriction, allowing all guests with whom he does business, employees or family members of the dominant tenement, to use the easement without interference. *Flynn v. Siren*, 219 Mont. 359, 361, 711 P.2d I371, 1372 (1986). It was not reasonable for Snavely under such law to lock and chain the gate and otherwise unreasonably interfere with Miller's right of access to his property. Nothing in this Court's Order granting the easement made such restriction, nor did Snavely ever request the Court to place restrictions on the free and unfettered right of access. I therefore conclude Snavely is liable for reasonable attorney's fees and costs in the sum of $5,120.00.

IT IS ORDERED Defendant's Rule 7052 motion is denied.

IT IS FURTHER ORDERED the DIP's objection to Proof of Claim No. 12 filed by Bonnie Snavely is sustained; and

Proof of Claim No. 12 filed by Bonnie Snavely on July 19, 2001, is disallowed as a duplicative claim.

IT IS FURTHER ORDERED the DIP's objection to Proof of Claim of Williams Kastner & Gibbs PLLC is sustained; and Proof of Claim No. 11 filed by Williams Kastner & Gibbs PLLC on July 19, 2001, is disallowed.

IT IS FURTHER ORDERED the Clerk shall enter Judgment that the DIP's objection to Proof of Claim of Margueritte L. Miller Trust is sustained in part and overruled in part; and Proof of Claim No. 8 filed by Bonnie Snavely, Trustee of the Margueritte L. Miller Trust on July 2, 2001, is allowed as a secured claim in the sum of $86,740.11; SUBJECT, HOWEVER to offset by Judgment in favor of the Plaintiff Douglas Miller and against Bonnie Snavely, Defendant, in the amount of $274,706.00.

IT IS FURTHER ORDERED the Plaintiff Douglas Miller is awarded the sum of $5,120.00 for attorney's fees and costs on the Rule 70 motion.

IT IS FURTHER ORDERED a separate judgment shall be entered in accordance with the above.

BY THE COURT

/s/ Hon. John L. Peterson
HON. JOHN. L. PETERSON
United States Bankruptcy Judge
District of Montana

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

[Filed May 02, 2001]

Case No. 01-30752-11

In re: DOUGLAS E. MILLER,

Debtor.

ORDER

At Butte in said District this 2nd day of May, 2001.

After due notice, hearing was held at Missoula on May 1, 2001, on the Debtor's motion, filed March 22, 2001, for sanctions against Bonnie Snavely ("Snavely") and her attorneys Williams, Kastner & Gibbs, PLLC, for violation of the automatic stay; and on Debtor's *ex parte* application for injunction under 11 U.S.C. §§ 105 and 362, filed April 3, 2001, to enjoin Snavely and her attorneys from further actions or proceedings in the Superior Court of Washington for King County, Cause No. 00-2-21981-4SEA entitled *In the Matter of Margueritte L. Miller Living Trust.* The Debtor Douglas E. Miller appeared and testified, represented by attorney Gary S. Deschenes ("Deschenes"). Snavely appeared and testified, represented by attorney Edward A. Murphy ("Murphy"). Attorney Scott Henrie ("Henrie") of Williams, Kastner & Gibbs, PLLC, who represented Snavely in Cause No. 00-2-21981-4SEA in the Washington Superior Court, testified. Exhibits ("Ex.") 1, 2, 3, 6, 7, 8, 9, 10, 11, 21, 22, 27, I and L were admitted into evidence.

FACTS

The facts which are material to the pending matters are not in dispute. Debtor filed a voluntary Chapter 11 bankruptcy petition on March 19, 2001, which is after a trial in Cause No. 00-2-21981-4SEA in the Washington Superior Court had taken place but before a written order or judgment was entered, although the judge had made a preliminary oral ruling from the bench in Snavely's favor at trial. Henrie and Snavely[1] both admitted that they received Ex. 1, the notice of filing of Debtor's Chapter 11 petition, prior to the entry of any written orders or judgment in Cause No. 00-2-21981-4SEA. Despite receiving notice, Henrie proceeded with Snavely's litigation.

Henrie testified that he consulted with bankruptcy attorneys and investigated whether Debtor's bankruptcy applied to Snavely's Washington litigation, the aim of which was, in part, to approve Snavely's purchase of certain property of the Margueritte Miller Trust[2] (hereinafter the "Trust") as a planned unit development[3]. As a result of Henrie's research he concluded the automatic stay did not apply.[4] Then, on

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[1] Henrie testified he told Snavely that the Debtor had filed the instant Chapter 11 petition, and that she was aware Henrie was proceeding in the Washington litigation notwithstanding.

[2] Debtor's Schedule A lists a real property interest consisting of a 1/3 interest in the Margueritte L. Miller Trust, with a current value of Debtor's interest listed at $1,043,558.61, plus certain mineral rights. His Schedule B lists several personal property assets consisting of contingent claims against the Margueritte L. Miller Trust and Snavely.

[3] Both Snavely and the Debtor are beneficiaries of the Margueritte L. Miller Trust. Snavely filed a Chapter 11 bankruptcy case in Washington the day before her mother Margueritte L. Miller's death. Later, Snavely amended her Chapter 11 Schedules to list ownership interests in Trust property.

[4] Snavely's theory is that the property of the Margueritte L. Miller Trust is not property of the estate by operation of 11 U.S.C. § 541(c)(2), which provides: "A restriction on the transfer of a beneficial interest of the

Snavely's behalf Henrie filed a pleading in Cause No. 00-2-21981-4SEA suggesting that the stay did not apply.

The Debtor filed his motion for sanctions on March 22, 2001. As a result of Henrie's and Snavely's actions, on March 23, 2001, the Washington Superior Court entered Ex. 21, an "Order re: Application of Automatic Stay under 11 U.S.C. § 362" and Ex. 22, "Findings of Fact and Conclusions of Law", in Cause No. 00-2-21981-4SEA. The Debtor filed his *ex parte* application for an injunction on April 3, 2001. On April 6, 2001, the Washington Superior Court entered Ex. L, a Judgment approving sale of the Trust's Kona Ranch property to Snavely for $2,000,000, approving Snavely's accounting regarding the Trust, including reimbursing Snavely from Trust property for her expenses and attorney's fees.

Debtor's counsel advised the Court that the time for filing an appeal of the Washington Superior Court's Judgment is about to expire. This Order renders an appeal in Cause No. 00-2-21981-4SEA unnecessary, as Snavely's and Henrie's actions after the petition date appeal in Cause No. 00-2-21981-4SEA were subject to the automatic stay. Hence, their actions and the Washington Superior Court's Order, Findings and Conclusions and Judgment entered by the Washington Superior Court in Cause No. 00-2-21981-4SEA are void.

DISCUSSION

The Debtor's filing of a bankruptcy petition gave rise to an "automatic stay". The Bankruptcy Appellate Panel ("BAP") for the United States Court of Appeals for the Ninth Circuit explained the automatic stay in *Balyeat Law Offices, P.C. v.*

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debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." Snavely did not file a motion or adversary proceeding in this Court seeking relief from the stay or a determination under § 541(c)(2) prior to proceeding in Cause No. 00-2-21981-4SEA.

Campbell (In re Campbell), 14 Mont. B.R. 132, 136-37 (9th Cir. BAP 1995):

> Section 362(a) states, in pertinent part:
>
> > Except as provided in subsection (b) of this section a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
> >
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> >
> > (4) any act to create, perfect, or enforce any lien against property of the estate;
> >
> > (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> >
> > (6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title; . . . .

"The automatic stay arises by operation of law upon the filing of a petition." *In re Mellor*, 734 F.2d 1396, 1398 (9th Cir. 1984). The stay is undeniably broad and should be given a broad meaning. *Morgan Guar. Trust Co. of New York v. Am.*

Sav. and Loan Ass'n., 804 F.2d 1487, 1491 (9th Cir. 1986); *cert. denied*, 482 U.S. 929 (1987). "Congress' intent in enacting § 362(a) is clear—it wanted to stop collection efforts for all antecedent debts." *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987) (*quoting In re M. Frenville Co., Inc.*, 744 F.2d 332, 334 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). "Section 362(a) automatically stays a wide array of collection and enforcement proceedings." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 560 (1990). See also *Delpit v. C.I.R.*, 18 F.3d 768, 770 n.l (9th Cir. 1994). "Section 362 is extremely broad in scope and should apply to almost any type of formal or informal action." *Id.* at 771 (quoting 2 *COLLIER ON BANKRUPTCY*, § 362.04 at 362-34 (15th ed. 1993). It "prohibits acts that, but for the stay, would be lawful." *In re Zartun*, 30 B.R. 543, 545 (9th Cir. BAP 1983). The stay is created for the benefit of the debtor, the debtor's property and the debtor's estate. *In re Casqul of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982).

In 2000 the Ninth Circuit entered a decision construing the automatic stay in *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000), which is binding precedent. The Ninth Circuit explained:

> Central to the, bankruptcy "case" as to which exclusive Article I federal jurisdiction lies is the automatic stay imposed by 11 U.S.C. § 362(a). Congress has declared that actions to "terminate, annul, or modify" the automatic stay are core bankruptcy proceedings. 28 U.S.C. § 157(b)(2)(G). The "automatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization of his or her obligations." *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715, 717 (9th Cir.1985). By halting all collection efforts, the stay affords the debtor time to propose a reorganization plan, or simply "to be relieved of the financial pressures that drove him into

bankruptcy." *Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters.)*, 96 F.3d 346, 351 (9th Cir.1996) (quoting S.Rep. No. 95-989, at 54-55 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5840-41). The automatic stay also "assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets." *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9th Cir.1995); see also H.R.Rep. No. 95-595, at 340, reprinted in part in 1978 U.S.C.C.A.N. 5787, 6297.

The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. *See* 11 U.S.C. § 362(a); *The Minoco Group of Companies v. First State Under-writers Agency of New England Reinsurance Corp. (In re The Minoco Group of Companies)*, 799 F.2d 517, 520 (9th Cir.1986). The automatic stay sweeps broadly, en-joining the commencement or continuation of any judicial, administrative, or other proceedings against the debtor, enforcement of prior judgments, perfection of liens, and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6).

The automatic stay is an injunction issuing from the authority of the bankruptcy court, and bankruptcy court orders *are not subject to collateral attack in other courts. See Celotex Corp.*, 514 U.S. at 313, 115 S.Ct. 1493. That is so not only because of the "comprehensive jurisdiction" vested in the bankruptcy courts, *see id.* at 308, 115 S.Ct. 1493, but also because '"persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.' "*Id.* at 306, 115 S.Ct. 1493 (quoting *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386, 100 S.Ct. 1194, 63 L.Ed.2d 467

> (1980)). In this case, as in most bankruptcy cases, the bankruptcy court notified the creditors, including the complaining witness in the criminal proceedings, of the applicability of the stay.

Gruntz, 202 F.3d at 1081-82 (emphasis added).

In the instant case the Debtor lists an interest in Trust property as property of the estate. Snavely and her attorney's received notice of commencement of the Debtor's case, and therefore had notice of the automatic stay. They did not seek relief from the automatic stay from this Court, or a determination whether the stay applied, even though such matters are explicitly deemed core proceedings. *Gruntz*, 202 F.3d at 1081.

Instead, Snavely's attorney Henrie stated that he researched case law, consulted with bankruptcy attorneys, and determined that the Debtor's Chapter 11 petition did not apply to Cause No. 00-2-21981-4SEA. Henrie testified that he concluded that the automatic stay did not apply. Snavely testified that she followed the advice of her attorneys, and proceeded notwithstanding the automatic stay in the Washington litigation to obtain findings and conclusions, a judgment, and even an order from the Washington Superior Court concluding that the automatic stay did not apply because the Trust contains a valid spendthrift trust provision, and thus the Trust corpus was excluded from property of the estate under 11 U.S.C. § 541(c)(2).

Murphy stated that he read the Ninth Circuit's opinion in *Gruntz*, but argued that the *Gruntz* holding does not control because it did not state that a state court could not rule on the applicability of the stay. I disagree. *Gruntz* states plainly: "In sum, by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope *and applicability* of the automatic stay." 202 F.3d at 1083, 1087 (emphasis added). Relief from the stay pursuant to § 362(d) and F.R.B.P. 4001 may be obtained *ex parte* or on

shortened notice, and Snavely has no excuse for failing to request relief from the stay, regardless of her reasoning, from the bankruptcy court.

The Ninth Circuit in *Gruntz* rejected the suggestion that states have concurrent jurisdiction over the automatic stay, and that even if states had concurrent jurisdiction they would have to defer to the federal courts' plenary power over bankruptcy proceedings. *Gruntz*, 202 F.3d at 1083. When Snavely and her attorneys went into Washington Superior Court in Cause No. 00-2-21981-4SEA after the petition date, they proceeded in a manner envisioned and warned against by the Ninth Circuit in *Gruntz*:

> The rule urged by the County would undermine the principle of a unified federal bankruptcy system, as declared in the Constitution and realized through the Bankruptcy Code. If state courts were empowered to issue binding judgments modifying the federal injunction created by the automatic stay, creditors would be free to rush into friendly courthouses around the nation to garner favorable relief. The bankruptcy court would then be stripped of its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize financial affairs. "Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating." *Gonzales*, 830 F.2d at 1035. It is but slight hyperbole to say that chaos would reign in such a system.

Gruntz, 202 F.3d at 1083-84.

Snavely's and her attorney's actions in the Washington Superior Court in Cause No. 00-2-21981-4SEA after the petition date, seeking orders and judgments determining whether

the Trust property is property of the estate, had the effect of subverting the exclusive jurisdiction of the federal courts to determine the scope and applicability of the stay, and whether the Trust property is indeed property of the estate or excluded by § 541(c)(2). As *Grunz* explained:

> Any state court modification of the automatic stay would constitute an unauthorized infringement upon the bankruptcy court's jurisdiction to enforce the stay. "While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances," such as the automatic stay, "it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions." *Donovan v. City of Dallas*, 377 U.S. 408, 412-13, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) (footnote omitted). Although *Donovan* discussed this rule as applied to in personam actions, its holding applies even more strongly to federal in rem proceedings under the Bankruptcy Code, in which a "federal court having custody of such property has exclusive jurisdiction to proceed." *Id.* at 412, 84 S.Ct. 1579; *see also Hong Kong & Shanghai Banking Corp. v. Simon* (*In re Simon*), 153 F.3d 991, 996 (9th Cir.1998).

Actions taken in violation of the automatic stay are void. *Gruntz*, 202 F.3d at 1082; *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *Hillis Motors, Inc. v. Hawaii Auto Dealers' Assoc.*, 997 F.2d, 581, 586 (9th Cir. 1993). Moreover, judicial proceedings in violation of the automatic stay are void. *Gruntz*, 202 F.3d at 1082; *In re Shamblin*, 890 F.2d 123, 125 (9th Cir. 1989). There is no question that the automatic stay was in place when Snavely applied for and obtained the findings and conclusions, order and judgment in the Washington Superior Court in Cause No. 00-2-21981-4SEA after the petition date. Thus each of those actions was stayed, and

each is void as an action taken in violation of the automatic stay. *Id.*

Next, the Court turns to whether the violations were willful under § 362(h). The BAP explained in *Campbell*:

> Section 362(h) provides:
>
> > An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> "Whether the party believes in good faith that it had the right to property is not relevant to whether the act was willful or whether compensation must be awarded." [*In re Abrams*, 127 B.R. 239, 243 (9th Cir. BAP 1991)]. A willful violation of the stay occurs where the party accused of such violation acts intentionally with the knowledge that the automatic stay is in place. Specific intent to violate the stay is not required. *Bloom*, 875 F.2d at 226.

14 Mont. B.R. at 149-150.

There is no dispute that Snavely and her attorneys proceeded in Washington Superior Court in Cause No. 00-2-21981-4SEA after having received notice of the automatic stay from Debtor's attorney. Therefore, the Court finds that Snavely and her attorneys willfully violated the stay. However, the Debtor offered no evidence at the hearing of the amount of any damages or attorney's fees incurred by the Debtor in these proceedings. Thus, the Court denies Debtor's request for sanctions and attorney's fees for failure of proof. There is no evidence on which to base a finding that Debtor suffered damages flowing from the entry of judgment[5], and

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[5] Debtor and his attorney Deschenes had ample notice of the hearing and opportunity to prepare and present evidence of the amount of attorney's fees. Despite such opportunity they offered no evidence of the

with this Court's determination that the Washington Superior Court's order, findings and conclusions and judgment are void, the Court deems no further sanctions appropriate.

IT IS ORDERED the Debtor's motion, filed March 22, 2001, for sanctions against Bonnie Snavely and her attorneys Williams, Kastner & Gibbs, PLLC, for violation of the automatic stay is granted in part and denied in part; the "Order re: Application of Automatic Stay under 11 U.S.C. § 362" and "Findings of Fact and Conclusions of Law" entered in Cause No. 00-2-21981-4SEA entitled *In the Matter of Margueritte L. Miller Living Trust* in the Superior Court of Washington for King County on March 23, 2001, and the Judgment entered in the same case on April 6, 2001, by King County Superior Judge J. Kathleen Learned are each void and of no legal force or effect; and Debtor's request for attorneys' fees and damages is denied.

IT IS FURTHER ORDERED Debtor's *ex parte* application for injunction under 11 U.S.C. §§ 105 and 362, filed April 3, 2001, is granted in part; and Bonnie Snavely and her attorneys Williams, Kastner & Gibbs, PLLC, ARE ENJOINED from further actions or proceedings in the Superior Court of Washington for King County, Cause No.00-2-21981-4SEA.

IT IS FURTHER ORDERED this Court's "Order Authorizing Employment of Attorney" entered April 2, 2001, is vacated pending further Order of this Court.

BY THE COURT

/s/ Hon. John L. Peterson
HON. JOHN L. PETERSON
United States Bankruptcy Judge

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amount of attorney's fees. The Court denied Deschenes' request to reopen the record to submit evidence of the amount of attorney's fees, because the Court does not deem it appropriate to penalize Snavely further by permitting Deschenes the advantage of curing an insufficient presentation of evidence.

APPENDIX E

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 00-2-21981-4 SEA

IN THE MATTER OF
MARGUERITTE L. MILLER LIVING TRUST

ORDER RE: APPLICATION OF AUTOMATIC STAY
UNDER 11 USC § 362

THIS MATTER came before the Court, as a result of the March 19, 2001 bankruptcy filing by Douglas E. Miller, at the regularly scheduled hearing on March 21, 2001, for the consideration and entry of final Findings of Fact and Conclusions of Law. Starting on February 6, 2001 and concluding on February 22, 2001 the Court presided over a full evidentiary hearing of the Petition of the Trustee for approval of the Trustee's accounting for the period from August 26, 1995 to August 25, 2000 and regarding the approval of the sale of the Trust's Kona Ranch property to Bonnie Snavely, individually. The Court orally ruled on the issues presented at the evidentiary hearing on March 7, 2001. The parties were directed to present written Findings, Conclusions and Judgment consistent with the Court's oral decision for entry on March 21, 2001. On March 19, 2001, Douglas Miller filed a Chapter 11 bankruptcy petition. On that same day, Notice of the Bankruptcy Petition was served on opposing counsel and filed with the Court. On March 20th, Scott Henrie, Ms. Snavely's personal attorney, served and filed a brief in opposition to the stay of proceedings. On the morning of March

21, 2001, Bergitta Trelstad, the Trustee's attorney, filed another brief in opposition to the stay. At the hearing on 3/21/01 as previously scheduled the Court heard argument on whether it should hold any hearing or take any action in light of the automatic stay. Present at the hearing were Ms. Snavely; her individual attorney, Scott Henrie of Williams Kastner & Gibbs PLLC; the Trustee's attorneys, Bergitta Trelstad and Keith Allred (for the morning session only) of Davis Wright Tremaine LLP; and Thomas E. Kelly, Jr. of Preston Gates & Ellis LLP on behalf of Douglas Miller. Mr. Kelly advised the Court and Ms. Snavely and her counsel that, among other things, he was there under protest, that it was Mr. Miller's position that the automatic stay was in effect, that any action taken by the Court would be void and that anyone violating the automatic stay would be subject to fines, sanctions and/or damages. Mr. Kelly objected to the hearing and proposed that the hearing be continued. The Court considered briefing on the issue of application of the automatic stay submitted by Bonnie Snavely individually and as Trustee, heard argument of all counsel and granted Mr. Miller's counsel additional time to present further authorities on the subject. All matters were reported by court reporter. The Court being fully advised, it is hereby

ORDERED ADJUDGED AND DECREED as follows:

The Margueritte L. Miller Trust contains an enforceable anti-alienation clause, Paragraph 8.03, and is a valid spendthrift trust under Washington law.

The release rights under Paragraph 8.02 of the Trust do not allow income or principal of Trust to be encumbered or assigned by a beneficiary.

Paragraph 8.02 of the Trust does not invalidate the anti-alienation clause in Paragraph 8.03 or otherwise render it unenforceable.

Because the anti-alienation clause is enforceable and the Trust is a valid spendthrift trust, the Trust corpus is excluded from property of the bankruptcy estate. 11 U.S.C. § 541(c)(2).

Consideration of Douglas Miller's liability for any of Bonnie G. Snavely's individual attorney fees and costs is stayed by the bankruptcy filing and that issue will not be considered by the Court.

Consideration of the remainder of the Findings of Fact and Conclusions of Law relating to the accounting for the Trust and to the sale of property of the Trust does not concern property of the bankruptcy estate and is not stayed by the bankruptcy filing of Douglas Miller.

DATED this 23rd day of March, 2001

/s/ J. Kathleen Learned
J. KATHLEEN LEARNED
KING COUNTY SUPERIOR COURT JUDGE

APPENDIX F

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CASE NO. 00-2-21981-4SEA

IN THE MATTER OF THE MARGUERITE L. MILLER LIVING TRUST,

Proceedings Before Honorable J. KATHLEEN LEARNED

King County Courthouse
Seattle, Washington

DATED: March 07, 2001

APPEARANCES:

Attorney for the Beneficiary, Douglas Miller:

BY: THOMAS KELLY, ESQ.
LON DALE, ESQ. (Telephonically)

Attorney for the Trustee:

BY: MICHELE RADOSEVICH, ESQ.

Attorney for the Beneficiary, Bonnie Snavely:

BY: SCOTT HENRIE, ESQ.

[2] PROCEEDINGS

(Open court.)

THE BAILIFF: All rise. Court is in session. The Honorable Kathleen Learned presiding in the Superior Court in the State of Washington.

THE COURT: Good afternoon. Please be seated.

THE COURT: You have a front row seat, Mr. Dale. I hope that you will be able to hear.

MR. DALE: I can hear you just fine, your Honor.

Thank you.

THE COURT: Before we start I want to welcome you back to the courthouse.

MR. HENRIE: Very glad that it is still. It looks like you took a little damage.

THE COURT: The more that you look, the more that you see. If you go down to the stairwells, it would be rather shocking. But we have been told that it is all cosmetic and not structural and that the building is no less safe than it was a week ago.

We have also been assured that the executive and the council will go ahead and try to speed up the seismic retrofit plan that is lumbering along.

So at any rate, I did want to thank you for your patience, not only because of the earthquake but the various and sundry other disruptions that we have had in [3] the course of this trial. Thank you all for your professionalism in that regard.

Also, before I do get into the substance of my decision, I did want to also thank each counsel for a very excellent and organized delivery of the case. That certainly helped me understand and go through it all.

I have spent a lot of time going back through the evidence. I read all of the exhibits that were submitted. I did go back over all of my notes as well of the testimony. Of course, I have reviewed the briefs and the authorities that you have cited there.

There are, obviously, a lot of issues, and a lot of facts. Although, the central issues that were presented for my

decision were few in number, the subissues, if you will, were multiple and it was, I won't say difficult but a long process for me to be sure that I was considering everything and remembering the various issues and points that you have raised throughout the course of the trial.

In giving my decision, I am not going to repeat everything that I have considered, because, obviously, it would take too long to do that. Matters that were not disputed, I will generally not address. I will leave it to you when you prepare proposed written findings of fact and conclusions of law to fill in the blanks for sake of continuity and to provide the appropriate background for [4] purposes of the written record.

The order in which I have addressed the issues here is not necessarily rigorous in its outline. I tried to be logical, but I have done it mostly just the way that I thought about the issues.

If you want to, in your proposed papers, to reorder the issues, that is fine with me. I am not tied to the order in which I am going to be addressing the issues.

Also, just preliminarily I think that this, unfortunately, will probably take me longer to do than any of us would rather. But I do want to articulate what I think is important. So bear with me, if it is not as succinct as perhaps it could be.

In any event, to begin with, I do adopt, for the most part, Ms. Snavely's testimony regarding the history of the ranch, the time-line, the background facts regarding Marguerite Miller's health and decline of her health and essentially adopt her testimony regarding what happened when and for the most part why.

There really was not substantial disagreement or dispute about all of those facts. There were a few minor things that were disputed, but they were minor. To the extent that they have any bearing on the issues that I had to decide, I will address them in the body of what else I [5] have to say.

So I won't go through a long litany of findings of fact that I would expect you to put in your proposed written findings, other than to just say that basically it was obvious from 1992 to 1995 Mrs. Miller was in a period of physical decline regarding her health, but that she did remain substantially mentally alert and able and willing to make both her wishes known regarding the ranch, regarding finances, and to participate in the discussions and major decisions that were made during that period of time.

I find that the Trust and the Will document did express her intent and wishes. There has been no evidence of undue influence shown. So that those documents are the basic underlying documents regarding the disputes here.

It is also clear by 1992 that Douglas Miller was not able, financially or otherwise, to provide the hands-on care that Mrs. Miller's physical condition required. There was evidence of neglect of her physical needs during this time.

I would say that I did not find Phillip Miller's testimony persuasive or credible to the extent that it was contrary to what I have just said.

It is also clear that Douglas Miller was not able to run or manage the ranch. I don't exactly know why, but [6] there appears to be some evidence regarding several failed basic business ventures on his part. Perhaps, the ranch was not runable. I am not sure about that either. In any event, it is clear that he did not have either the motivation, the interest, or the business ability to manage the ranch and have it be a viable source of income for the care of Mrs. Miller.

It is clear that Bonnie did rescue Mrs. Miller from a very perilous situation, both financial and physical at the time.

I don't think that it is necessary for me to catalog or even define why it is that the ranch was not at this point a viable business entity. There appears to have been, apparently, a number of reasons for it. It clearly wasn't at that time.

Nevertheless, although it was not a source of ongoing income, the ranch certainly did have substantial value as a piece of real estate. But with little income and with debt coming due, there certainly was the threat of foreclosure at this time.

(I am summarizing the things that I said that I wasn't going to summarize.)

It is also clear to me that essentially Doug did abandon both his mother and the ranch at this critical period of time and that Bonnie spent not only time, but [7] certainly substantial amounts of money from a variety of sources in attempting to rescue the situation.

From the Trust documents it is clear that Mrs. Miller did want her assets, the ranch asset, to be used for her needs: For not only her basic needs of physical care and comfort, but to sustain herself in a life that would be as much as possible consistent with what she was used to and what would be pleasurable for her, given the physical difficulties that she had.

It is clear that she had no wish or intent to live in poverty or in discomfort in order to preserve any particular portion or percentage of the estate for her beneficiaries, and that either she or the trustee were certainly within their rights to spend or all [sic] of the Trust assets on her care and comfort while she was living.

It is also clear that she trusted Bonnie Snavely's judgment regarding providing care to herself, regarding real estate matters, regarding the financial matters and management of the Trust. She gave the trustee broad powers to manage the Trust and to manage the ranch and to provide for the needs of Mrs. Miller.

I also find that it was the long-term family plan of both Mrs. Miller and the other family members as well that the ranch would not, in fact, be passed on from generation or

generation as an operating ranch, but that [8] at some point it would be developed or sold for development and that some type of plan for development was, in fact, contemplated for some period of time.

There was some evidence that had Doug been able to take the ranch over and manage it and turn it into a profitable enterprise that Mrs. Miller, perhaps, would have sold it to him. But it is also clear that he wasn't able to do that. And clearly in her Will and in the Trust documents she abandoned whatever prior intent or prior communication she had to sell it "for a good price" to him.

Just to recite briefly the Trust documents do say that the purpose was to provide for the orderly distribution of the Trust assets, that the five-year period of time recognizes or recognized that it might take some time to not only market or distribute this type of property, but to settle legal disputes that may arise. As I believe that I already ruled prior to the actual commencement of the testimony here, the five-year period was not an automatic drop-dead date, if you will, but rather an indication that that was the estimated time that it would take and also a clear message that the Trust was not simply to go on forever and to operate continously into the future.

It is clear that after the death of Mrs. Miller, a [9] variety of litigation proceedings did, in fact, slow down or hamper and delay both the distribution and development of the sale of the property. And I won't go through the list of all that litigation. It would be helpful if, in your proposed findings, you did actually put the dates of filing and conclusion of those matters.

(I went back and started to make a list of that, but it was taking too much time to do that.)

It is also clear that I can't say that title was affected for the entire five-year period of time, from the beginning to the end of the Trust period. There does appear to have been a window of opportunity between approximately April of 1997 and

some time in early 1998, where there was no litigation tying up the property.

Mrs. Snavely did, throughout this period of time, make efforts to try to market the property and look for developers. I do find it credible that her inability at all times have [sic] marketable and clear title was certainly a detriment to aggressively marketing the property.

Mr. Mitty himself testified that he did talk to her, I think, on several occasions during these earlier periods prior to recently. He indicated that he never went very far with it, due to the litigation.

It is clear that Mrs. Snavely believed that the more valuable manner in which to market the property was [10] as a planned unit development of some form rather than to break it up and sell it in 20-acre parcels. That is the manner in which she was attempting to market it.

Her opinion, as the owner of the land and as someone with expertise in real estate, also, was credible to me. But it was also supported by some of the other testimony. For example, the appraiser, Mr. Stevens, who addressed breaking the property up, believed some of the pieces might sell for a good price, but that then the other pieces would suffer greatly, such that the sum of the parts would be less or substantially less than the whole.

Moving on, I will come back to some of these other issues later, when I am talking about the Trust accounting, but I want to focus first on the buy/sell agreement.

First, I will address the issue of fair market value. I do find that it is basically not significantly disputed that the highest and best use for this property is a high density planned unit development of some type of master plan development.

Even Mr. Jetty's appraisal, although he talks about selling it off in 20s, was not contemplating single-family residence

on 20-acre parcels, but rather he was contemplating that the 20s would then individually be [11] developed at a high density.

I do find that the Stevens' and Kosena's appraisals were sound, except I do find that they should have at least discussed the factor regarding the DeChamps' comparable regarding the exclusive listing agreement. That fact, apparently, was not told to them. Therefore, it isn't their fault not to have included in [sic] their assessment. But it does appear to be a factor that did need to be addressed.

However, it is not clear what value to put on it. An opportunity to earn a real estate commission does involve work. Presumably there would be work in the future in order to gain a commission. Both the buyer and the seller did not consider it a significant enough factor in the sale of the property to have mentioned it to either Mr. Stevens or Mr. Kosena.

Therefore, I assume, it may have some role, in establishing value, but that would it not have substantially altered the appraisal figures. It might only serve to increase somewhat by a small factor of the Stevens' and Kosena's appraisals.

I would not find that it would take either of those appraisals in excess of ballpark $2 million.

To the contrary, I did find that Mr. Jetty's appraisal was too high. I found Mr. Kosena's critique and [12] Stevens's critique of Jetty's appraisal to be persuasive. I did feel that the discount rate that he used was too optimistic; that it was too aggressive or optimistic to assume that the 20s could all be sold in a four-or five-year period. I think that it was Mr. Kosena who said that a more average or consistent time period would be approximately a 10-year time period to sell that number of 20s.

The whole issue of providing access to individual 20s also was not discussed. I won't go through all of the points that

were raised by the critique of Mr. Jetty. But I did find that they were persuasive to me and that Mr. Jetty's appraisal was not as sound as either Stevens' or Kosena's.

In determining the fair market value, it is also appropriate to consider both of the offers that have been made on the property. The Potter and Clinton offer of $2 million certainly appears to be a good faith offer.

Regarding, the Mitty offer, again, I find that the Kosena analysis of that offer is sound and that the offer, in fact, does not have a present value worth $2.4 million. That if you take the 10-year period for the completion of development, which is half of what the potential would be, all the way out to 20 years, his present value would be $2,080,000, which is a little bit over of the Potter and [13] Clinton offer at $2 million, but not significantly greater than the $2 million offer. It is still far less certain because it is estimating the pay-out at 10 years rather than 15 or 20.

The analysis of the dollar pay out doesn't take into account the substantially longer contingency period between the two offers.

So I don't find that the Mitty offer is in excess of $2 million. It is somewhere in that ballpark. I conclude, therefore, that both from the appraisals and the actual market offers that a fair market value of $2 million is or does appear to be well supported by the evidence. That number is a little bit higher than the Stevens' and Kosena's appraisals, but would be consistent with both the "real market test" that was suggested in argument, and with adding some little amount as I said for the DeChamps' comparable.

Mr. Dale had suggested in his argument, and in cross examination questions, that the property should continue to be on the market to continue to test what the market would bring. However, there was, in fact, no testimony to support actually doing this. There was no evidence to believe that the

two people, who came forward with offers were the only ones who knew about the property. So there is no evidence for the Court to [14] conclude that there are, in fact, other willing and able buyers out there who did not come forward, or who would come forward with any better offer than what has been made currently.

Then, of course, the whole purpose of an appraisal is to attempt to estimate what the market is. The appraisal mechanism is a valid one that is recognized and utilized widely both in court and in non-Court business transactions.

At this point, particularly given the necessities of the time constraints for both the sewer district and the debt coming due in April, it would probably be to have this property on the market currently, in the nature of a fire sale, which would more likely bring a lower price rather than a higher price.

There was not any testimony from a real estate expert to support the argument that a multiple listing would be a better way to go, particularly at this point. There was no testimony to contradict Ms. Snavely's testimony that for this particular type of property the multiple listing is not going to generate the best price or find a developer for this property.

So although there were argument and questions along those lines, there was, in fact, no testimony to the Court to contradict Ms. Snavely's opinion.

[15] Comparing the Potter-Clinton and the Mitty offer, because it is appropriate to do that, it is not enough for them to be similar. The burden here on the trustee is to show that her own buy-sale agreement, backed up by the Potter-Clinton offer, is better than the Mitty offer.

A number of factors support the conclusion that it is a better one. First of all, there is the whole issue of cash versus terms and a pay-out over a 20-year period. The pay-out could be as low as $1.8 million on the Mitty offer. As I said, it

would appear that a 10-year period, at least, for the pay-out is more reasonable rather than a shorter period of time.

Mr. Mitty testified himself that he had planned to hold it for long-term development. It didn't appear to be that he was planning a quick turn around whatsoever. It is also clear that the beneficiaries wanted cash. They had been offered some participation in a long-term development. Apparently Mr. Mitty had approached Douglas at some point regarding purchase of Douglas' property, which suggestion had been rejected by Douglas because he rejected "terms" . . . he wanted cash. This is Mr. Mitty's testimony.

There is also—I didn't hear this actually in the testimony, but in the Trust documents there was the issue that the intent of the Trust was to provide money for [16] college for the children. I don't know where they are. I don't know if they are finished with college at this point or what. I didn't hear that testimony. But it is certainly consistent with the intent of the Trust as well as the individual intent of the beneficiaries that they obtain cash from an early distribution, rather than having to wait 10 or 20 years for the pay-out.

There is then also the matter of contingencies. Certainly the Mitty offer has a very long contingency period. I think that it was 2 1/2 years. If I added the 12 year periods correctly, versus the 90-day period on the Potter-Clinton. There is no contingency on the buy/sell between Bonnie and the Trust, other than the Court's approval. The uncertainties regarding the contingencies are of much less concern than they are on the Mitty agreement. The Mitty offer appeared to be, I would say, very favorable to Mr. Mitty in giving him numerous opportunities to walk out the door.

Regarding the notice issue that was raised, I do find that, obviously, the purpose of notice is so that the parties can come into Court and complain or obtain Court approval. Ms. Snavely's application for Court approval provided that notice.

The sale will not and cannot go forward unless it is approved by the Court.

[17] So the beneficiaries have been put in no worse position by getting the notice for Court approval as opposed to getting earlier notice. They are in court doing the same thing, as if there had been an earlier notice. So I find that the Court approval process substantially complied with the notice requirement of the statute.

Regarding the self dealing issue, the burden of proof is on the trustee here. She can sell to herself as long as certain requirements are made. It is not inherently always forbidden. It clearly requires scrutiny. To get Court approval, the burden is on the trustee to show, first of all, the fair market value, to show that it is in the best interests of the beneficiaries and that she is not profiting at the expense of either the Trust or the beneficiaries, and that there is no other similar fair market value offer.

I have already addressed that this is a fair market value price. The Mitty offer is not a better offer overall, when you consider the uncertainties and contingencies, as well as the estimate of what the actual present value is of that offer.

It is in the interests of the beneficiaries to obtain cash and, particularly in this situation, be able to avoid continued litigation and involvement with the [18] Trust property, that would potentially occur.

I think that I mentioned already that, perhaps not in connection with this particular buy/sell, but in the past the testimony was, and I found it credible, that she did offer co-participation to the beneficiaries, and they indicated that they were not interested. There was no testimony presented to the Court that they had any interest or ability to engage in a similar type of co-participation. Therefore, I find that she was not competing with the other beneficiaries for a business opportunity.

Arguably one could say, well, perhaps what you should do is continue the Trust long-term and have the Trust be the partner with Potter and Clinton, and distribute some cash to all of the beneficiaries, enable the Trust to become the beneficiary of the profits to be made in the long-term from the development of the property.

Now, the problem with that is that it appears to be contrary to the terms of the Trust. The Trust was looking to an early winding up, relatively early in terms of real estate. So that the five-year term in the Trust is very pertinent to this point. It was not contemplated by Mrs. Miller that this Trust would continue for some 20 years to maximize all potential profits in the future that [19] might ever be made off of the ranch.

I also would find that for the Trust to continue through this period of time would not be in the best interests of any of the beneficiaries or the Trust itself. Such a continuation would provide, unfortunately, but undoubtedly, numerous opportunities for further litigation and discord amongst the parties.

I further would find that there is no evidence to support that Potter and Clinton or any other developer would, in fact, be willing to partner with the Trust that has had this litigation history. Therefore, although there might have been the theoretical argument that there is some potential business opportunity of the Trust being foregone, that I find as a practical and legal matter that is not consistent either with the terms of the Trust or with the best interests of the beneficiaries.

So I conclude that this buy/sell agreement is not competing with the Trust or the other beneficiaries for the business opportunity; that there is no evidence that there is a better price out there. There is no showing that there is self-dealing here to the detriment, in any way, of the Trust or the other beneficiaries.

As a beneficiary, Ms. Snavely is entitled, and under this Trust she was entitled, to distribute her share to herself in

kind and, then, of course, she can do with [20] it what she will once she does that.

A number of other reasons have been raised and suggested as to why, nevertheless, the Court should not approve the buy/sell agreement. These are tangential reasons that have to do more with punishing her, if you will, for acts that were considered to be inappropriate in managing the Trust.

For example, it was suggested that because she didn't sell in 1997, in that window of opportunity, that she should not now be allowed to sell to herself now. I have to agree that there was not in the testimony really a clear, good explanation of why what appeared to be a window of opportunity went by. There was some evidence to support that. I will deal with that more later. But regardless of whether or not she should have more aggressively sold it, or tried to sell it in 1997, is not a persuasive reason not to approve a sale at the highest and best use today, unless there are some good alternatives.

It is also suggested that the co-participation agreement that is contemplated has drawn a lower price or that the $2 million price is lower due to her interest in being a co-participant.

First of all, I reject that suggestion, because that would have been reflected in the appraisals. The [21] appraisals didn't consider the current offers and her work or a lack of work getting developers interested in the property.

Again, there was no real estate expert to testify that a higher price could be obtained, if there was not a co-participation agreement contemplated. As I said previously, there is no persuasive testimony that the fair market value is higher than either the appraisals or the value that she is using for the sale to herself.

Also raised as an issue for not approving the sale is her decision to incur debt along the way, rather than break up the property, and sell individual 20s.

Again, I will come back to this issue in more detail, but in terms of looking at that issue as a reason to not approve the buy/sell agreement, the general conclusion that I reach is that the highest and best use was that the property be sold as an unit, rather than an individual 20s. Her decision to incur debt did, in fact, preserve that ability.

Regardless of whether that was or was not the right decision, looking at it in retrospect, it is now done. Again, other than for punitive purposes, it is not a reason to disapprove the current sale. In other words, if that was a bad decision, to incur all of that debt, there are other ways to deal with it. I will address that whole [22] issue, when I address the Trust accounting issue.

Suffice it to say that I did find persuasive the testimony that selling off some of the 20s would have created a substantial risk of having decreased the overall value of the property. This was reflected in Mr. Stevens' comments in his appraisal. I cannot say at this point that the savings and interests from the debt would have offset that decrease in the market value.

Regarding her failure to pay certain taxes and have the construction liens on the property, these are minor issues that either did not or do not pose substantial risk to the property. And if they were unsound decisions and inappropriate decisions, again, there are other remedies available through the Trust accounting and do not provide significant reason to disapprove the current sale.

Lastly, it has been suggested that there are some other, better, alternatives than approving the sale to Ms. Snavely. Partition was one. That has been suggested, which is probably what would happen if the sale didn't go through.

I think that everybody agrees that that is an undesirable outcome, although Mr. Miller appeared to argue for it, at least in part. Certainly partition would not be the highest and best

use. There would continue to be litigation in order to determine how to divide it.

[23] Clearly, the values of the lots differ, depending upon where each lot is. So you would end up with a patch-work of lots, much as there is kind of a patch-work now in the property that is owned by the parties that is outside of the ranch. There are all of the access issues that would go along with that.

I am not saying that it couldn't be done, a partition couldn't be done. It could be done, but it would take time and be expensive and likely to yield less overall value to the beneficiaries.

It was suggested that the Court take supervision of the sale. There is certainly no evidence presented to believe that, as I said, anything other than a fire sale would ensue, or that this Court would be able to find appropriate individuals to manage such a sale. The result, I find, would be further delay, further litigation, further expense, and there was no evidence presented to the Court that it would likely flush out any better offers than have been presented to date.

A third similar suggestion in terms of appointing an interim trustee and having it listed on the Multiple Listing Service. We do, of course, have the problem with the bank wanting its money in April. Again, I am repeating myself, there is no reason to believe that any better offer is out there, other than speculation and [24] argument, but no evidence upon which to support that.

I do find that the Mitty offer, and interestingly enough, as was pointed out, maybe it was an oversight, but I don't think so. It was not suggested that the Court Order that the Mitty offer would be approved. In any event, I find that that offer is significantly less desirable, given the considerable delay and the number of contingencies involved and the fact that there would be no cash for the bank in April.

I conclude then that the alternatives to approving the buy/sell agreement with Ms. Snavely are significantly worse in terms of the long-term interests of the beneficiaries, and that there is no overriding need to have Court intervention here. That the primary reason to do so would be punitive for judgment calls in managing the Trust, for which there are other alternatives, if necessary.

I find that Ms. Snavely is not profiting at the expense of the Trust or the other beneficiaries; that there is no improper motive; that there is no higher or better price or even the same price; and that her efforts at being choosey have likely resulted in having gotten the best offer to be had under the current circumstances. I am, therefore, going to approve the buy/sell agreement.

I will now go on to the Trust accounting. There [25] are a lot of issues to deal with here.

I will try to keep an eye on the clock. I may take a—I hope that I can get through with this without taking a break for everybody's attention factor.

First of all, I find that Ms. Snavely, overall, was credible; that she is honest and well intentioned towards her mother and towards managing the Trust.

I find that there was no fraud, embezzlement, or stealing money from the Trust. There is no evidence that the Trust funds were used for her personal expenses. To the contrary, I find that she spent personal money for Trust purposes, for some of which she has not requested reimbursement.

In terms of the ranch guest house issue, which I will get to in a minute, to the extent that that could be deemed personal expenses—at least that is going to be a legal issue that I will deal with—I find that there is no missing money. As I said, she voluntarily absorbed certain costs that she did not or was not required to do so. She is not engaged in over-reaching or improper use of any Trust funds or Trust assets.

I find that overall the accounting is accurate. I have to say that it was not ideal, however, in its presentation of detail. I do find that although it meets the statutory requirements, that it nevertheless was [26] difficult to go behind it. It was time-consuming, both in trial and in my deliberations, in going behind it to actually understand the summary detail.

Part of this I believe was due to the fact that under our statute, this happened quickly. Part of it is also due to the fact that it was summarizing an extensive period of time. I will come back to that.

This accounting is not an audit. It clearly is not an audit, and it doesn't meet auditing standards. However, neither the Trust nor the statute require an audit. So one of the major disputes here is should the Court nevertheless have required an audit?

It is clear that Mr. Miller wanted an audit and doesn't trust Mrs. Snavely. However, the mere fact that one beneficiary doesn't believe or trust the trustee, doesn't, by itself, require or trigger the necessity for an audit.

I did find persuasive the testimony of both the bookkeeper and the accountant and the other people who have dealt with Mrs. Snavely, that they were satisfied that her actions were above board and accounted for, that the documents appear to be in order and all present. They went through the checks and the quick books and relied on the checks. I find that it was reasonable to rely on the checks, even if an invoice wasn't there.

[27] The people that worked with her and for her found her to be honest and testified that the questions that they had were answered to their satisfaction.

I find that these people were astute astute [sic] enough and professional enough to have noticed, or been alerted if there were anything significantly out of order.

Mr. Galipeau testified that he believed that an audit was necessary primarily—as I understood his testimony—because of what he claimed to be self dealing and commingling of the funds. However, I do not find that there was any substantial commingling of funds. She did lend the Trust money and paid herself back, but that is permissive and is not commingling of funds.

I also find that audit would be very expensive and time-consuming and result in further delay. I do believe that an audit would not resolve what the major disputes are here.

First of all, I don't believe that an audit would find anything significantly missing or out of order. The major disputes, for example, whether she should have incurred as much debt as she did would not be resolved by doing an audit. The amount of her trustee's fees would not be advanced any further by doing an audit. She admitted that she didn't have records or keep time sheets. There are not going to be any time sheets to find to [28] audit.

I do not find that an audit would be helpful. I will come back later to this. It is clear that the Trust documents required an annual statement of some sort and that wasn't done in the technical sense. It clearly wasn't done. On the other hand, there was a substantial amount of information about the Trust and the management of the Trust that was provided to Mr. Miller in the course of litigation throughout the life of this Trust.

Mr. Miller filed various discovery requests in litigation that resulted in his actual receipt of a substantial amount of information.

It is clear that Mr. Miller was persistent in going to Court, when he believed that he did not have information. He certainly didn't apply to the Court to compel an annual statement. About the only thing that I find that an annual statement might have done would have made it easier for me

to track and follow the flow of some of the loans, replacements, and repayments, which was difficult for me not being as intimately familiar with all of these documents as the rest of you, and it may have been somewhat helpful for Mr. Miller as well.

I do not believe, however, that annual statements would have, in fact, resulted in any less litigation. It might have resulted in more litigation, but not in less [29] litigation. I, principally, do not find that the annual statement would have mitigated or lessened the lack of trust that Doug had for his sister in the management of this Trust. It appeared to me from the evidence that Mr. Miller was determined to believe that he was being wronged and to threaten litigation at the first opportunity rather than the last; that he, in fact, did not make good faith efforts to understand the transactions.

I am not at all satisfied that an annual statement would have changed that state of affairs.

His disdain for Bonnie, and apparently at times for his mother, was unfortunate and clear.

I find that he did know or should have known that the Trust at least had no income or minimal income from the rental of the guest house, and that the minimal income was not sufficient to deal with the expenses of the Trust. I find that he knew or should have known that Bonnie, in fact, was loaning money to pay bills rather than selling. He knew or should have known that the property wasn't being sold, but was incurring debt.

If anything, the annual statements would have provided more requests for auditing each annual statement. Based on the evidence of Mr. Miller's adversarial stance at all opportunity, his lack of apparent care for his [30] mother, his precipitous abandonment of the ranch, his lack, really of any meaningful efforts to assist in that difficult time, that evidence satisfies me that merely complying with the technical

requirement of a Trust d[sic] annual statement would not have, in fact, altered any of the events that occurred or prevented any of the litigation that occurred.

It was suggested that had there been an annual statement, that he could have objected to the loans and required the sale of the property at a sooner date. But as I indicated in my finding, in fact, he knew that there were, that the Trust couldn't meet the expenses of the ranch. If he didn't know, he certainly should have known. That he certainly knew that ranch lots were not being sold. And, in fact, he, as well as the other beneficiaries of the Trust, all, in fact, objected to the sale of individual lots, when the bank trustee was trying to sell them.

Although in retrospect it may have sounded like a good argument, after actually scrutinizing the testimony, I don't find that the annual statements would have significantly altered any of the matters that are currently before the Court.

In terms of the issue of the number of Trusts, it is true that there were not three individual Trusts [31] created. However, the Trust document authorizes the Trusts to be consolidated for convenient administration. The major asset of the ranch was the ranch. There was no purpose to divide it into three and then consolidate it back again for purposes of administration.

The assets numbers can be divided by three. There is no reason to have have maintained three distinct Trusts.

I don't find that there is any breach of the agreement, or any injury regarding that duty of the trustee.

Moving on to the issue of the ranch house and the 25 acres, they were in the Trust prior to Mrs. Miller's death then were specifically devised upon death to Ms. Snavely. The language of the Trust was very clear:

"My trustee shall distribute outright the ranch house of 25 acres and all my personal property thereon."

Now, she clearly—Mrs. Snavely—didn't do it. I find, however, that she did not do that in good faith. Apparently, she did obtain some professional advice, although the testimony was little vague on precisely who gave it to her.

I find that the failure to actually legally distribute it was not done for nefarious reasons, but rather for administrative reasons and for the intended [32] purpose to benefit the overall Trust property and not to benefit herself individually.

Nevertheless, she has kept the records to enable or to prevent the actual commingling of expenses and income as between herself and the Trust. I hold that she should be deemed, in fact, to have distributed the property herself from the time of death, and that she is essentially deemed to have loaned it back to the Trust for purposes of the use of the income generated and for ease of administration of the whole, as she was loaning any money that it had generated to the Trust. So that the income that was generated is not income of the Trust, but a loan from her.

The expenses associated and the capital expenses are chargeable to her. The taxes, insurance and utilities were aggregated and there is here a technical commingling of expenses of the Trust and personal property or Trust property and her property. But it does appear that that was to the benefit of the Trust, because in the aggregate her testimony was that the expense would be lower per unit rather than for two separate parcels.

I find that there has been no harm to the Trust.

But it is clear that there does need to be a proper allocation of the taxes, insurance and utilities to the specific parcels. I would use for that the relative [33] values, I didn't actually do the math on the 1990 values, but on the 1995 values. If you use $650,000 for the ranch house, et cetera, over the whole, which would be $2,650,000, then the ranch property would be 25 percent and, therefore, there should be—eyeballing it—it

looked like it was the same proportion as in 1990. So that the allocation should be approximately 25 percent of the taxes. Utilities would be different, because utilities have to be different because most of the ranch didn't have utilities.

MS. RADOSEVICH: There may be irrigation expenses.

THE COURT: Right.

I also conclude that any appreciation in the value of the ranch house and 25 acres belongs to her. It is not property of the Trust so that it is appropriately carried as it is shown in the accounting at the same value as it was at the date of the distribution, or the date of the death.

As to the matter regarding Mr. Loken, obviously as between the Trust and third-parties, the property wasn't distributed. Mr. Loken has a mechanics' lien on the entirety of the property. The failure of the property to be distributed did expose the Trust to some liability for the capital expenses and for any costs that might exceed the income coming into the Trust. Regarding, the Loken [34] lien, however, the bulk of the expense appears to have been as a result of expenses paid for the improvements and the cleanup of Trust property, if I remember the figures correctly. But it does tie up both pieces.

I find that at this time that there has been no injury to the Trust. There is potential injury to the Trust, but I will also find that it has been open and obvious to everyone involved throughout the proceedings that her property has not been distributed. There has been no prior demand to do so.

In fact, it would appear that the argument here was that it should be considered not to have been distributed for purposes of benefiting both from the income and the appreciation that were a result of that, her property remaining inside of the Trust.

I find that there is an easy remedy and that would be to distribute that land immediately and—I don't know what you

do first, but to apply to the Court dealing with the Loken litigation to have the lien simply separated and put it in two, to correspond to the unpaid funds that may still be in dispute between Mr. Loken and the Trust and Ms. Snavely.

It appears to be an administrative matter that can and should be done to remove the Trust from any liability for unpaid expenses due to the ranch house remodeling. So [35] I would require that would be done as soon as possible.

MR. KELLY: I thought that she had agreed that she was going to pay it off. I don't know why—

THE COURT: I think that is vis-a-vis Potter and Clinton.

MS. RADOSEVICH: She would take on the liability.

MR. KELLY: Who is it that is going to go to the Court in Montana—

THE COURT: One way or the other she is to have documented, not just verbally, but to have documented her liability for that.

MR. HENRIE: We can do that.

THE COURT: All right.

I find that the Subaru expenses were the automobile was to be hers. However, it was primarily loaned to the Trust and used in the exercise of the Trust duties. The minimal expenses related to it were not improper utilization of Trust funds.

The insurance deductible I also find was a non-issue. That is clear that the entire deductible ended up coming out of her side of the ledger. I do not find that she was trying to pass it oft on to the ranch properties. She, in fact, took the entirety of the deductible, rather than the proportion that she could have argued was her sole obligation. I find that that was [36] consistent with her not—with her attempt to be conservative in assuring that she was not over-reaching into matters of the Trust.

In terms of the commingling allegations, I really find that there was no substantial evidence of commingling, other than these sort of minor issues that I have already discussed. The loans to the Trust are not commingling. There is no evidence that she paid personal expenses out of Trust monies. She did satisfy the burden of proof to me that she has been honest in attempting to keep separate and detailed records regarding the expenditures of the Trust.

It is true that in an accounting matter that doubts are to be resolved against the trustee. But on these issues that I have addressed so far, I don't have doubts.

The quick books are very detailed; check numbers are all there. Exhibit 110 with all of the checks, the bookkeeper, the accountant satisfied me that everything was properly allocated.

The defense did not show me anything specific that is sufficient to raise my doubts.

As I said, the transaction details are very detailed. Just picking one at random on January 19, 1999, there was a charge for $5 worth of gas. It appears as though the details were very carefully maintained.

[37] Regarding the Maddy Dixon matter, Marguerite Miller's sister, did make loans to help for her care. She did not execute any significant paperwork to confirm, other than the notations on the checks, her expectations of repayment. She certainly knew that the ranch had value, but that the problem was cash flow. I am talking about Maddy Dixon right now.

It is my finding that her intent was to, perhaps, hope and expect repayment, but not that—her desire was not to lien the property or cause further problems by encumbering any one's assets or to require repayment as a condition of her making the loans for the care of her sister.

I also find that Mrs. Miller would have wanted to pay her back. I don't know whether she actually knew that the loans were being made, but certainly that she would have wanted payments to be made back.

Nevertheless, the matters were not listed or the amounts that had not yet been paid back was not listed as an asset in the Dixon estate. The trustee's obligation is to the beneficiaries of the Trust and not to Mrs. Dixon.

It would be different if Mrs. Dixon were still alive, and the repayments were to be made to her. Apparently during the time that she was still alive, there was some repayment made to her before her death, although [38] I don't have the dates of all of those.

But at this point there is a certain amount of potential self dealing here to the extent that, as I understand it, that Ms. Snavely is the beneficiary of the residuary estate of Mrs. Dixon. So that any monies paid back to Mrs. Dixon's estate would go to Ms. Snavely at this point.

The duty of the uninterested or uninvolved trustee is to conserve the assets for the beneficiaries. I am going to disallow the items of repayment that have not yet been repaid. I think that it was a $10,000 amount. I am disallowing that amount.

Regarding the lawsuit income, I find that that was properly accounted for. The full $952,000 was, in fact, the judgment that the Trust was entitled to.

The fact that the net payment to—or the net recovery by the Trust was substantially less, doesn't make it improper to list the judgment at the full amount and to include in the accounting of the Trust the amounts that then were paid for the attorney fees and costs and all those things. In fact, that is the right way to do it, rather than as suggested by Mr. Miller.

Moving on to the item for receipts for borrowing, $519,000, et cetera. I find that those are accurate and they are not overstated or double accounting. I find that [39] the fact that the Trust was not listed as a co-debtor in Mrs. Snavely's bankruptcy does not mean that the borrowing did not occur on behalf of Mrs. Miller, but simply means that the Trust was not encumbered by those loans that eventually went or went to Ms. Snavely and then eventually were deposited into the Trust.

I don't find that there is any inconsistency in the documents that Mr. Kelly tried to establish, because of the different way in which each party dealt with the guest house rental income. The guest house rental income was hers and was loaned to the Trust and so it was properly considered as part of the loans to the Trust.

When you include that, rather than excluding it, the figure is correct. The $174,000 figure is correct for Bonnie Snavely loans net of repayment. Mr. Kelly's argument about an inconsistency is because he didn't include the guest house rental income as part of the loans from Bonnie.

Overall, again, I did not find that there is double counting here. I did my own rough and ready eye ball, if you will, check on the expenses. I came up with a minimum—I want to emphasize minimum, because I feel that it was a minimum, of the medical expenses or the expenses for the care of Mrs. Miller over that approximate three-year period as a minimum of $300,000. Again, I will [40] just run through how I estimated this from the testimony. I didn't try to do it in an accounting manner.

For the nursing care provided by Mrs. Johnson from September of 1992 to January of 1993, I figured 7 hours a day at $20 a day, five days a week, for $11,200. January 23 to October 1993 the Madison House was $3,000 a month, plus the nursing care at $8,000 a month. That is $99,000. Novem-

ber of 1993 to November 1994, that is when she was back in Montana with nursing care, $8,000 a month. That is another $96,000. November 1994 to August of 1995 is there was the Sunrise House and nursing care; and it was a little vague on what the nursing care figure was during that period of time. I only had one bit of evidence on that; that was $2,500 a month for a total of that period of time of $50,000. Just those nursing home and nursing care expenses come up to $255,200.

I know there were periods of times when she was in the hospital and some other little things that you could take out or add as I say. I didn't do it in an accounting manner. I was just trying to ballpark how far on or off target we are here.

There was in addition to that, has to have been additional expenses to come up to my minimum of $300,000 over this three-year period. There was at least a couple of years there of food when she wasn't in the nursing [41] home. So somebody had to buy food. There was clothing. There were the De-Pends. There were other small things regarding the pleasures of life, expenses for flowers, for—I can't remember now, a number of other things that were—it was clear that the Trust authorized, that Mrs. Miller would have wanted and that she was entitled to enjoy to have comfort and pleasure and to preserve her dignity in the difficult times that she was experiencing, regarding her physical health.

I would find that looking through the checks and seeing the kinds of things that were being purchased, it is clear that Mrs. Snavely really spared no expense, if you will, to make sure that her mother was comfortable and well cared for during this period of time.

I have no hesitancy finding that there was a minimum of $300,000 and probably expended more for the care and comfort of Mrs. Miller.

There was in addition to that, of course, the ranch expenses, the travel expenses, the lawn mowers, all of the things

that were required to keep the ranch going. This is now the August 1995. These were the earlier expenses. There was the $250,000 Farm Credit debt. Then during the course of the Trust, post death, the expenses of $172,000 on insurance, taxes, repairs and improvement, the interest and the loan associated fees.

[42] I didn't add all these up. I have to say that it would have been helpful to have had interest and loan fees hose [sic] separated out, what were the basic loans and what was the total of accumulated loan fees and interest fees. But certainly a minimum, just between Mountain West Bank and the Gingrich loan it looked like it was $60,000 in interest and loan fees just between those two loans. The accounting fees are all accounted for. The legal fees throughout the estate administration. So that is at least another—again, I am just ballparking it without adding it up exactly—another $300,000 there. The $250,000 for the Farm Credit debt. I had no trouble, based on the evidence, quickly adding up the big numbers, and coming up close to $900,000 to $1 million of outgo over the period of the time of the beginning of the Trust. The original living Trust is included, because of those debts carried on into the Trust as of August of 2000.

The question was asked at some point:

"Where did all this money go, all this money that was borrowed?" It seems pretty clear to me where it went. It didn't go into Mrs. Snavely's pocket. There is no double counting here. There was that much money borrowed and there was that much money spent.

So I really have no evidence to show that there was double counting. No testimony to show that there was any [43] evidence of double counting. The accountant did not believe that there was any double counting and did answer the questions that were presented about that.

So as I say, the criticisms of the accounting I feel are not substantiated regarding an allegation of double counting. I agree it is kind of hard to track all of this, partially because the debt carried over from preAugust of 1995.

As we know, the time period for this accounting is 1995 to the year 2000. However, a substantial number of these debts predated that period of time and the loans that predated that period of time that poured over into the Trust is part of the difficulty in keeping track of where things came from. I have to agree that if you are primed to not trust the trustee here, and if you look only at the surface documents, you would say, "well, I don't understand any of this. What is going on here?"

But when you look behind it and you look at all of the documents and at the exhibits and you listen to the testimony, I am very satisfied that there hasn't been any double counting in any of these matters.

I approve the hard money loans, the request for the repayment for the hard money loans. I approve the $101,560 that was requested for the personal loans over and above the hard money loans. I don't find any [44] irregularities and that the records are all there. Again, I think that I am repeating myself, the quick books, the checks, the bank records are all consistent with the testimony.

Moving on to the issue of the loan whether it was prudent to take out as many loans as were taken out, as opposed to selling one or more of the 20-acre parcels, first of all, I have to say that this issue has to be looked at from the time at which the decisions were made and not in retrospect.

During some periods of time, because of litigation, it would have been difficult to separate or sell certain parcels. Early on, I think that it was reasonable for Ms. Snavely to assume that the loans were going to be relatively short-term and it was reasonable not to anticipate that it would simply get bigger and bigger as time went on.

It was a reasonable judgment call on her part that it was worthwhile to try to maintain the integrity of the ranch and not break it up. I find that the carving out of one or more 20s to sell would have in the long run have diminished the overall value of the Trust assets. That was her professional opinion. That was also backed up again by the appraisers. Particularly I am thinking of the comment by Mr. Stevens in his report, that if you were [45] going to carve out a 20, what you would end up doing, you would take out the 20 by the road that had access and then you would, as a result, cause difficulty for the ones behind that didn't have road access and access for power and utilities, et cetera.

Again, there was no real estate developer or developer, who provided any testimony to the Court to say anything to the contrary. Again, we had argument and suggestion, but I did not have testimony that this was not a reasonable judgment call for her to make. In retrospect, it is a complex analysis to determine exactly whether or not now, in retrospect, the overall costs of the indebtedness was less or more than the decrease in the Trust value that would have occurred had one or more 20s been sold off.

But it would appear to me that, in fact, the cost of the debt is or was less than the diminishment in value. I refer to the Kosena analysis of the Jetty appraisal, or the Jetty approach, because his, Mr. Kosena's analysis, if you use the Jetty approach of separating the 20s and selling them separately, his present value of that was, I think, in the range of $1.4 million, or 1 point something million dollars, which would, if it is $1.4 million, be a $600,000 diminution in the overall Trust value.

Although they were substantial, the interest and [46] loan costs that have been occurred by the Trust are less than $600,000.

I find that her goals in trying to preserve the Trust property as one piece were laudable. That she was trying to preserve it to obtain the highest and best value for the beneficiaries, and that she did rely on her best judgment as a realtor.

There was no credible evidence that she was wrong about that. Although we might be able to figure out in retrospect that it might have come out differently, I haven't actually been shown that by the testimony, and I don't believe that to be likely.

Even if in retrospect her judgment was wrong on this issue, it doesn't invalidate her original judgment decision, which the Court would not interfere with absent a showing of fraud and actual improper mode, et cetera.

I also point to the fact that all of the beneficiaries did object originally, when the first trustee, the bank trustee wanted to sell off 20s. Everybody agreed then that wasn't a good idea. I think that was in 1992. There was also some testimony that Ms. Snavely had attempted to do some type of platting and make arrangements to get money short of getting a loan, but couldn't get the cooperation of her brothers to do that.

[47] Therefore, I find that it was not imprudent, or a breach of her fiduciary duties to pursue the course that she did in incurring debt, rather than selling off parcels of the property, and that this suggestion is now an after thought.

Turning now to the proprietary of the personal representative fees . . . (I have got probably another half hour. Does any one want a break?)

. . . regarding the propriety of the personal representative fees, executor fees listed at $69,000. It is clear that there were no contemporaneous records made and that this fee was not listed as a receivable in Ms. Snavely's bankruptcy. She testified that really there was no separate issues here. That the probate was the Trust. Essentially, all of what she was doing

for the Trust was what she did or would have done for the probate matter.

She did have lawyers, and what little activity that occurred in the probate file was done by the probate lawyers. I did review the probate file. There is not much in there, other than the same repetitive requests for an extension of time for filing reports.

The work on the 706 was work that she did, but she has included that in her time estimate of the work that she has done as the trustee. I do have to conclude on [48] this matter that there is not an adequate showing that there have been separate specific duties that have not otherwise been accounted for in her requests for trustee fees and that it would be double counting to award her both trustee fees and executor's fees, which would appear to be for the same work.

I, therefore, will deny the amount that was listed for the executor's fee. The amount that has already been paid, that is to be credited against the amount that still would be due to her under other parts of her claims.

Regarding the remodel work and the irrigation expenses, there were clearly significant expenses incurred to repair and rehabilitate buildings on the ranch and to restore the irrigation capability of the ranch.

Again, regarding the restoration and the repair and clean up, again, that is a judgment issue that the trustee made to determine what would be in the best interests of the overall enhancement of the marketability of the property. Depending upon which appraisal that you look at, the value of those improvements was listed some where between $30,000 and $50,000, some where in that ballpark.

The expenses to repair and remodel were in the neighborhood of $45,000. So there are a little bit more or a little bit less, depending upon which way you go, and clearly the place needed to be cleaned up to market it.

[49] I can't say that this was a breach of duty to do this. Again, I did not have from a real estate expert any evidence to contradict her judgment that—not that the price would be changed for the property, but that the marketability of the property, in other words, actually getting people to pay the price, her belief that it would be enhanced by having the place look nice.

In terms of the irrigation expenses, Mr. Stevens, did refer to at least irrigation rights in his appraisal. He didn't separate them out, but he mentioned them as a characteristics of this property, that it did have irrigation rights. To maintain those irrigation rights in terms of the different assessments, I think that it was clearly appropriate to pay those and would have been a wasting of a potential asset of the property to allow the irrigation rights to disappear.

I do find, however, that the purchase of irrigation equipment in the amount of approximately $24,000 does not appear to be related to the current productivity of the ranch or its sale price. I don't think that they were, at least I didn't get the understanding that they were actually being used. I may have misunderstood the testimony in that regard. It appears more to have value to the future owner potentially, if they want to keep the grass green.

[50] Again, I am a little unclear on exactly the use of the irrigation equipment. But it was clearly not included as part of the appraisal as providing any value whatsoever to the property. I am going to require that therefore it be allocated to her.

On the bankruptcy legal fees, the dispute is what aspect of her personal bankruptcy fees are chargeable to the Trust?

I find that she did file for personal bankruptcy prior to her mother's death or just prior to the death, and a primary purpose was to prevent the foreclosure on the ranch. That strategy did, in fact, succeed. I found reliable and credible the

testimony of her attorney, Mr. Kornfeld, who testified that approximately 74 percent of his work in that bankruptcy was devoted to Trust related matters, either the Farm Credit matter or Douglas Miller issues. I think that he said 37 percent for Farm Credit issues and 37 percent for Douglas Miller issues. He then said that post confirmation, 85 to 90 percent was Trust related matters.

So at a minimum 75 percent of his work, by his testimony, was related not to her personal issues but to Trust related matters.

I find then her request of 60 percent of those fees to be allocated as a Trust expense is both conservative [51] and substantiated by the evidence. I will allow that.

The fact that it is not listed as a receivable in her bankruptcy, again, I don't believe that it ordinarily would be. I didn't have, again, testimony from a witness to say that how she was going to pay her attorney fee bill would be listed in the bankruptcy.

I am skipping around a little bit here, I am sorry. I tried to go through the accounting as you did, Mr. Kelly, to keep on the same page, but I ended up not doing it that way. I apologize if it is not entirely in order.

Some of the issues on page 10 of the accounting, the debts of the decedent, which is based on the 706, the attorney and accounting fees, I find were all administrative expenses that were necessary and authorized by the Trust, that the Trust was broadly authorized to manage all of the affairs of the Trust and all of the decedent's assets went into the Trust. All of the debts went into the Trust too. I find that all those matters were properly paid for or owed by the Trust.

The plat development, I also find that that was authorized under the broad Trust powers. The testimony of Mr. Ainsworth supported that it was done for the benefit of the Trust and not personally for Ms. Snavely.

Regarding the miscellaneous expenses of $14,327, it [52] is—leafing through Exhibit 110, I find expenses for makeup and flowers and postage and carpet cleaners and Kinko's and many of those sorts of things. I have no reason to question that there is adequate support for those expenses.

That was for 1993 that we were talking about, it is credible to me that that was makeup for Mrs. Miller not for Mrs. Snavely.

The Stevens' Company that was, I guess, Mr. Stevens was a friend from whom she borrowed some money. I found her testimony credible on that. The AG sales, the issue was raised in the closing argument. I have to say that I don't remember that coming up in testimony. I don't know what that is, other than to presume that—I think that it was $500 worth of something that is supported and apparently was found to be supported in the records of the quick books.

There was criticism that were inappropriate or inadequate records for the telephone and travel charges. But Ms. Snavely did testify that she did keep these records, that she had produced them in discovery. I found, again, that her testimony was credible, that the amounts were reasonable in relationship to the amount and distance traveled between Seattle and Montana, the amount of time that obviously she had to make on different trips [53] involving Trust matters and litigation.

Moving on to another big topic, the topic of trustee fees, Ms. Snavely testified that this was a full-time job, that she believed that she was spending full-time at it.

It is clear, however, that she kept no contemporaneous records other than a few notations on her calendar about meetings. This is a serious matter not to have kept those records. It is an obligation, particularly if you want fees, to keep records to justify the requests for fees. There is, I think everybody has a tendency to over-estimate the amount of

time that they are doing something. When they have actually looked at the clock, it may not be as long, except maybe when you are in court you think it has only been short and it turns out to be a long period of time.

In any event, I think that memory does not serve us very well in estimating time, particularly after a long period of time.

Her attorney testified that at times she was working full-time in the bankruptcy matter litigation. I believe that there was some testimony from Mr. Wilcynski—I couldn't actually find it in my notes so I am going from my memory—that he testified that it was clear to him that she was spending a great amount of [54] time. But, again, I couldn't find that in my notes. I am going on memory from that.

But he did testify that the records looked orderly and complete and it, obviously, took time to keep those. There certainly were a lot of things to keep her busy. There was extensive litigation. She did testify, and I found it credible, that she did spend time marketing the property. Certainly, it took time to put together the brochure, for example, that was Exhibit 38B, I think.

There was, obviously, a lot of time necessary to keep all of the creditors at bay and to keep track of the financing, to take care of the property and I would find that even though that she hasn't kept records that is not a reason to give her nothing for her fee work; what is reasonable is to try to make the best conservative estimate of the amount of time that it would have taken or should have taken to accomplish all of those activities.

She estimated, I believe that it was—I divided her numbers there, about 25 percent of her time. I think that ended up at 11 hours a week. She said 10 hours a week, if you divide the numbers it comes out to 11. I looked at, I don't find that an unreasonable estimate. I looked at it as more of one normal

day a week, rather than one long day a week, to be sure that there is not an excess of time being requested here. I am reducing that [55] request to 20 percent rather than 25 percent, or say it another way, one-year full-time as opposed to five years full-time.

I find that there were clearly enough things that happened and work that needed to be done to support one person working full-time to accomplish all those things. So that would be—she estimated 10 hours—I misspoke. My estimate is 10 hours a week for 52 weeks, a 10-hour day or an 8-hour day and a 2-hour day.

She is requesting the rate of $75 a hour. I looked, at that figure as well. She did bring some expertise to this job. Certainly her major job as a trustee was to manage real estate. She does have real estate experience, not necessarily in managing it, but in understanding what is involved in all of the matters that can affect real estate and attempting to sell real estate. She clearly brought expertise to the job. She clearly had abilities in financing and was able to juggle fairly complicated financing issues.

On the other hand, she is not a professional trustee. She clearly relied on attorneys and accountants for a substantial amount of advice and direction. That is good that she did that.

And, the Trust paid a premium for those professional expenses and for that advice. As a result, I [56] think that it would be inappropriate to charge the higher fee at $75 a hour. I will reduce that to $50 a hour.

I find that Mr. Sherwood's estimate of simply looking at the average hourly rate of her real estate income is not an appropriate measure of the value of her services to the Trust.

My multiplication at 10 hours a week for 52 weeks, at $50 a week is $130,000. That is for the period of time of the Trust from the death of Mrs. Miller. She did serve as trustee prior to

that, however. There was about a 18-month period when she was trustee during the living Trust. So at the same rate that would be an additional $38,000. I would approve a total amount of trustee fees for $168,000.

It has been suggested that I should reduce her trustees' fees even further as a result of the other factors, such as for her failure to do the annual accounting. I have previously indicated that I do not believe that the annual accounting would have reduced litigation. In fact, I think that it might well have increased the litigation. I won't repeat what I have said before. I do not feel that there is a significant injury to the Trust, or breach of duty regarding the annual accounting, because of the other avenues of information that were available and made available through the [57] litigation, to justify reducing her trustees fees any further than they have already been reduced due to her failure to keep time records.

Going back to the issue about whether or not she should have been more aggressive in 1997 and 1998 about selling the property, I have to say that I am left with some nagging doubts about this issue. There was some testimony, I think that she did testify that her bankruptcy trustee tried to sell the property at some point, but was unable to do so and that might have been during that period of time.

I am, as I say, however, left with some question about whether or not her personal interest in co-participation and the "vision", that she had for the development might have—I want to emphasize might, it is not probable—might have reduced the pool of potential buyers and the speed with which the property could be sold. I do not believe, as I have already said, that that affected any price matters but it might have affected the aggressiveness of her marketing efforts and the speed of sale.

It is not clear to me how vigorous her efforts were in that window of opportunity, in terms of marketing. There was

some testimony about people that were contacted, but it is not clear that they were contacted during that [58] period of time. There was fairly sketchy testimony to support really how vigorous her efforts were. It would appear that a fair amount of time was spent in this remodel work rather than in the marketing work. This is an issue on which my doubts have not been satisfied.

As I say, I do not believe that it is appropriate to conclude that the property would have been sold during that period of time. ! don't find that it is probable. But I am uncertain enough about it that I believe that there may have been an opportunity that may have been missed and that this doubt has to be resolved against Ms. Snavely.

I wrestled with how to deal with that. There is no precise way to do it. But I do believe that a further reduction in the trustee fees is probably the most appropriate way to handle and would be a 5 percent reduction further in her trustee fees. I would reduce it more, if I thought that it was probable—if I had any good evidence that that land would have sold during that period of time. I don't think that it is probable. So 5 percent off of $168,000. I didn't do that math. I will let you do that.

It was also suggested that her fees should be reduced further because she failed to prevent the discord amongst the family here; that the litigation could have [59] been avoided had she followed the terms of the Trust.

The specific things that Mr. Sherwood pointed out were the annual accounting, dividing the Trust into three pieces and some other directives of the Trust.

With all due respect to Mr. Sherwood's opinion, I do disagree with his conclusions. I don't believe that he was provided with a sufficiently full picture of the family and of the prior litigation and the discord. The discord was certainly evident, and there was plenty of discord in this family prior to

the creation of the Trust. I guess it would unfortunately appear to be a dysfunctional family, at least as to the siblings.

Clearly, there was the testimony that Douglas not only threatened but did litigate against his mother in her last years; testimony that he hated Bonnie; that he retained the lawyer almost instantaneously at the death of his mother.

He walked off the ranch in 1992. There certainly is also evidence that Phillip, who was a shadowy figure in the case, appears not to have lifted a finger either in assistance, or at least not without demanding immediate guaranteed security. I find it highly unlikely that merely dividing the Trust into three Trusts and issuing accounting statements would have in any way lessened the discord in this family.

[60] There is also the question, what if any role did Ms. Snavely play in all of this discord?

I don't know. I think that it is clear that there was a certain amount of tit-for-tat going on as well from her side and that the affections were not returned either. However, I cannot say that as trustee she had the ability to change the realities of the family dynamics.

The question then is should she have stepped aside and have somebody else come in as trustee? The evidence against that would be, first of all, of course, her mother specifically named her as trustee and wanted her to be trustee. I presume that her mother was aware, certainly was aware of Douglas' problems with what was going on. Clearly, a professional trustee or an outside trustee would have cost substantially more, and most likely would have resulted in the foreclosure of the ranch, as an outside trustee would not have taken the kinds of steps that Ms. Snavely did to prevent the foreclosure.

There was already the negative experience with the Montana Bank acting as a trustee prior to Bonnie. I don't know what other appropriate trustees there might have existed in the area.

In addition, I believe that there still would have been litigation. There may well have been litigation against whatever trustee was trying to manage this [61] property in its rather dire straits. In retrospect, perhaps it would have been better from a family dynamic standpoint for her not to be the trustee. But for the purposes of the actual financial interests of the beneficiaries, I find that it would have clearly not been to the beneficiaries' benefit for her to have stepped aside. I do not find that this was a breach of her duties or resulted in a breach of her duties and would not reduce her fees as a result of that.

I don't find other reasons to reduce her requested fees other than what have already been reduced to.

In terms of the mineral rights, I have to confess I got a little lost on that issue. There are rights that need to be included. I think that was testified to, but I have to confess that I lost that number.

MR. KELLY: We are just asking that one-third of all of the mineral rights be awarded to Mr. Miller by deed, or whatever the mechanism is that we do that. Mr. Dale could probably address that.

THE COURT: I will let you address that afterwards, because I looked through my notes and I have to say that I didn't quite understand the position.

MR. HENRIE: There is a little confusion that mineral rights are entirely separate from the ranch.

THE COURT: Of course, there are mineral rights [62] associated with the Trust. The mineral rights that are subject of the testimony is mineral rights that were—if they were her assets, they went into the Trust.

MR. HENRIE: That is correct.

THE COURT: So they need to be divided.

The grazing land lease I did find her testimony credible that she bid for it at public auction and that before her mother's death that it was hers. It was not part of the Trust. It is, in any event, of no value to any one but her. Therefore, it is not part of the Trust or wasn't part of the Trust.

Coming back to the audit issue, just to put a period on it, if I hadn't already, after going through all of this, I still don't find there was sufficient grounds to require a full scale audit, although the presentation in the accounting document is summary. I find that the summary is correct and that there was not any indicia of unreliability that would require an audit. To do so would really get us nowhere. In fact, it would move us substantially backwards, because there would then be further litigation regarding the audit. The major issues that I have addressed would not be substantially changed by an audit.

I think that there were a couple of other small points. The non-intervention powers of the personal [63] representative under RCW 11.68.090 did not require her to produce receipts or checks for the expenses paid for the decedent. Just to clarify that issue—I think that I already touched on this, but just to be sure—the accounting and legal fees, the predeath accounting and legal fees, the Kimball Parr Marguerite Miller prebankruptcy fees, those were appropriately poured over as a debt of the decedent into the Trust and authorized to be paid.

If there is any ambiguity in the wording of the Trust documents, it was clear, at least to me, that the purpose and intent of the Trust was to take care of all of both assets and the liabilities of Mrs. Miller, one way or another, through the operation of the Trust and not to leave some other mechanism out there or to cutoff or to prevent creditors from being paid.

I have denied the motion for—I guess this is obvious, just to make it clear—that I have denied the motion for a trustee ad litem.

And then lastly on the attorneys fees requests, there wasn't much discussion about this in closing. I think that both parties have asked for attorneys fees.

MR. KELLY: I know that we did.

MR. HENRIE: We certainly do, your Honor.

THE COURT: I considered this, and spent quite a [64] bit of time thinking about this issue, because clearly the statute gives me considerable leeway and discretion in determining what to do about attorney fees. I don't know the amounts, but I assume that the amounts are pretty substantial on both sides.

I have looked at a variety of aspects of the case. I do find that Douglas Miller was and has been intransigent. He has litigated rather than made good faith efforts to understand transactions and documents. I did find that he is and has been through the evidence—it didn't come through in his testimony, but through the history, spiteful and motivated to frustrate the efforts of Ms. Snavely, relitigate issues that have already been resolved.

On the other hand, in his testimony I found him somewhat considerably meeker than I would have expected from what I had heard previously.

I am not sure whether he has some limited ability to understand the transactions. I am speculating to some extent about that. Clearly, he is hampered by his distrust of Ms. Snavely. But as a beneficiary, regardless of the family dynamics, or his personal limitation, he is entitled to understand the transactions and the documents.

He did raise some points in the litigation that I have considered positively in his favor, not the bulk of [65] them, but certainly on some aspects of the trustee's fees, for example. As I said, I do also feel that Ms. Snavely has played her role, whatever it is. We didn't really get fully into that in this case, thank goodness. But in the family dynamics, I did

get a feeling that there was to some extent a kind of a tit-for-tat: "If he is not going to be nice to me, I am not going to be nice to him either."

I did find that she has her own personal animosity in part deserved, perhaps, by his apparent mistreatment of their mother. But as trustee, she certainly was obligated to put that aside and not be influenced in any way by that. It is a hard task.

Overall I do feel that his responsibility in accelerating and accentuating the litigiousness of this matter was substantially greater than hers. He clearly appears to have put—or more than willing and eager to put road blocks at every opportunity, even to the ultimate detriment of the his interest in the Trust assets.

What I have determined is that overall in trying to allocate fairly the responsibility for all of this, that Douglas is 75 percent liable, if you will, and Ms. Snavely is 25 percent. That as a result that Douglas is to pay 50 percent of her personal fees and I am assuming, it may not be accurate, I am assuming work on either side is roughly [66] equivalent.

MR. KELLY: I haven't seen their fees.

THE COURT: That is my basic approach. If there is substantial difference in the amount of the fees, I would be willing to reconsider that allocation. But, since I didn't have any fee applications from anybody, I just operated from the beginning on the assumption that for every push in one direction there is a push back in the other direction and that responsible attorneys have about the same amount on each side.

MR. KELLY: If I could observe, your Honor—

THE COURT: Particularly here, when we are talking about the personal fees, not the Trust fees. I am not requiring him to pay the Trust fees but her personal, to the extent that she had personal attorney fees as opposed to the trustee's fees.

I am not requiring him to pay the trustee's fees. Trustees' fees come out of the Trust.

MR. KELLY: If I could argue, it is transparent that she is the Trust. They had two attorneys. All of those fees should be accounted as her portion of it, at least for this allocation.

THE COURT: She had personal claims that were not claims of the Trust, but her personal claims. How they were allocated we will have to look at that. I am not [67] necessarily accepting the way that it is presented. It has to be presented. We are talking concept here, not numbers.

This is the end of my notes. There may be questions and there may be motions for reconsideration. There usually are. I am not going to entertain any of those this afternoon. I would ask that—I can't preclude you from making any motions, but I would ask you not to make motions for reconsideration on matters where you simply disagree with me, but try to limit yourself to those things where it looks like I have misunderstood the evidence or misquoted the evidence in a clear way.

I have spent a lot of time on this. I don't think that I have misunderstood much, although I might disagree with the interpretation of the evidence. So I would appreciate not having to go through it all over again on a motion to reconsideration, but I certainly will entertain questions. I don't think that I can do that this afternoon.

MR. KELLY: I have one question.

THE COURT: All right.

MR. KELLY: The $126,000 she claimed in the interest, maybe I misheard. I didn't hear you discuss that.

THE COURT: The interest on the—

[68] MR. KELLY: On her loans.

THE COURT: —on the loans. I didn't specifically mention that. I meant to include that in my indication that I was

approving the loans that there was not double-dipping, not double counting. The loans were made and the money was spent and that she is entitled to repayment for those. I am sorry if I didn't specify that.

MR. HENRIE: Your Honor, I will go back and look at those and maybe Mr. Kelly and I, I think that there might be a little reduction warranted in those in light of the limitation we made on the $200,000 claim.

THE COURT: That is right.

MR. HENRIE: But it is a mathematical thing and Mr. Kelly and I can arrive at an agreement on that.

THE COURT: That would be great if you can work that out.

What I often find helpful in presentation, or most helpful in presentation of findings of fact and conclusions of law is for the primary prevailing party, which is Ms. Snavely here, propose theirs and then the other side do a red line version, rather than having two purely separate ones. It is harder to juxtapose them.

MR. KELLY: I am concerned that we have adequate time to do that. There are, I expect extensive findings. I am not in charge of writing them. I see a lot of them. [69] I may have a lot of comments.

THE COURT: I will leave that up to you people how you want to do that.

MR. HENRIE: I will provide Mr. Kelly digital versions of them.

THE COURT: Certainly, Mr. Kelly, if you want to send to them things that they ought to be in there, so they get them in there the first time around, that is fine, too.

I will cooperate with you in trying to get them entered as soon as possible, also. We will have to set a date for presentation.

MR. HENRIE: Next Friday.

MR. KELLY: Next Friday is not going to be available. I have to be in communicate with my counsel in Montana.

THE COURT: We will do it at on the 21st at 8:30. That is all for today.

THE CLERK: All rise. Court is in recess.

(Court was recessed.)

APPENDIX G

UNITED STATES COURT OF APEALS
FOR THE NINTH CIRCUIT

[Filed April 6, 2005]

No. 03-35317
D.C. No. CV-02-00023-DWM
District of Montana, Missoula

In re: DOUGLAS E. MILLER,
Debtor.

BONNIE G. SNAVELY,
Defendant-Appellant,

v.

DOUGLAS MILLER,
Debtor-Appellee.

ORDER

BEFORE: ALARCÓN, W. FLETCHER, and RAWLINSON, *Circuit Judges.*

The panel has voted to deny the petition for panel rehearing. Judge W. Fletcher and Judge Rawlinson have voted to deny the petition for rehearing en banc, and Judge Alarcón has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX H

28 U.S. C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection[1] shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

(June 25, 1948, c. 646, 62 Stat. 931; Nov. 6, 1978, Pub.L. 95-598, Title II, § 238(a), 92 Stat. 2667; July 10, 1984, Pub.L. 98-353, Title I, § 101(a), 98 Stat. 333; Oct. 27, 1986, Pub.L. 99-554, Title I, § 144(e), 100 Stat. 3096; Dec. 1, 1990, Pub.L. 101-650, Title III, § 309(b), 104 Stat. 5113; Oct. 22, 1994, Pub.L. 103-394, Title I, § 104(b), 108 Stat. 4109.)

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[1] So in original. Probably should be a reference to subsection (c).